(15)

No. 93-1636-CFX
Status: GRANTED

Title: Tom Swint, et al., Petitioners
v.
Chambers County Commission, et al.

Docketed:
April 18, 1994

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: McDuff,Robert B.

Counsel for respondent: Sapp,Ernestine S., Webb,Kendrick, Smith,Paul M.

Final amended opinion issued 1-18-94. Ptn due & mld 4-18-94, see ml label re dkt dt.

Entry	Date	Note	Proceedings and Orders
1	Apr 18 1994	G	Petition for writ of certiorari filed.
2	May 20 1994		Brief of respondent Chambers County Commission in opposition filed. VIDED.
3	May 25 1994		DISTRIBUTED. June 10, 1994 (Page 3)
4	May 31 1994	X	Reply brief of petitioners filed.
5	Jun 13 1994		Petition GRANTED.
			**********
6	Jun 24 1994	G	Motion of petitioners to dispense with printing the joint appendix filed.
8	Jun 28 1994		Order extending time to file brief of petitioner on the merits until August 12, 1994.
9	Aug 2 1994		Motion of petitioners to dispense with printing the joint appendix GRANTED.
10	Aug 12 1994		Brief amici curiae of American Civil Liberties Union, et al. filed.
11	Aug 12 1994		Brief of petitioners Tom Swint, et al. filed.
12	Aug 12 1994		Brief amicus curiae of United States filed.
13	Aug 12 1994		Brief amicus curiae of Southern States Police Benevolent Association filed.
16	Aug 12 1994		Brief amicus curiae of United States filed.
15	Aug 18 1994		Order extending time to file brief of respondent on the merits until September 30, 1994.
17	Aug 29 1994	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
18	Sep 26 1994		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
20	Sep 30 1994		Brief of respondent Chambers County Commission filed.
21	Sep 30 1994		Brief amici curiae of National Association of Counties, et al. filed.
22	Sep 30 1994		Brief amicus curiae of Jefferson County, Alabama filed.
23	Oct 4 1994		CIRCULATED.
24	Oct 7 1994		SET FOR ARGUMENT TUESDAY, DECEMBER 6, 1994. (1ST CASE).
25	Oct 27 1994	G	Application (A94-309) to extend the time to file a reply brief from November 2, 1994 to November 9, 1994 by petitioners Tom Swint, et al., submitted to Justice Kennedy.

2 pp

No. 93-1636-CFX

Entry	Date	Note	Proceedings and Orders
27	Oct 28 1994		Application (A94-309) granted by Justice O'Connor extending the time to file until November 9, 1994.
26	Oct 31 1994		The parties are directed to file supplemental briefs addressing the following question: "Whether the Eleventh Circuit, by virtue of its jurisdiction to review the District Court's denial of the individual defendants' motions seeking summary judgment on the basis of qualified immunity, also had jurisdiction to review the District Court's denial of the Chambers County Commission's motion for summary judgment." The brief of petitioners is to be filed on or before Wednesday, November 30, 1994. The brief of respondents is to be filed on or before Thursday, December 15, 1994. Rule 29.2 does not apply. This case is removed from the December 6, 1994, argument calendar.
28	Nov 7 1994	D	Application (A94-309) to extend further the time to file a from November 9, 1994 to November 23, 1994, submitted to Justice O'Connor.
29	Nov 8 1994		Application (A94-309) denied by Justice O'Connor.
31	Nov 9 1994	X	Reply brief of petitioners filed.
30	Nov 14 1994		SET FOR ARGUMENT TUESDAY, JANUARY 10, 1995. (1ST CASE).
32	Nov 30 1994	X	Supplemental brief of petitioners filed.
33	Dec 15 1994	X	Brief of respondent in opposition filed.
34	Dec 28 1994		Record filed.
		*	Record proceedings U.S. Court of Appeals, Eleventh Circuit and U.S. District Court, Middle Dist. Alabama (BOX)
35	Jan 10 1995		ARGUED.

No. _____

In The

Supreme Court of the United States

October Term, 1993

TOM SWINT, et al.,

Petitioners,

v.

CHAMBERS COUNTY COMMISSION, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT B. MCDUFF*
771 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

CARLOS A. WILLIAMS
Post Office Box 306
Mobile, Alabama 36601
(205) 434-2478

BRYAN STEVENSON
114 North Hull Street
Montgomery, Alabama 36104
(205) 269-1803

Counsel for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the sheriff of a county is a final policymaker for the county in matters of law enforcement for purposes of county liability under 42 U.S.C. § 1983.

PARTIES

The parties in the court below are as follows:

Plaintiffs-Appellees: Tom Swint, Tony Spradley, Drecilla James, and Jerome Lewis.

Defendants-Appellants: Chambers County Commission, City of Wadley, Alabama, James C. Morgan, Freddie Morgan, and Gregory Dendinger.

The plaintiffs-appellees are petitioners in this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES – Continued

Page

Statutes

No. _____

In The

Supreme Court of the United States

October Term, 1993

TOM SWINT, et al.,

Petitioners,

v.

CHAMBERS COUNTY COMMISSION, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioners, who are citizens of Alabama and plaintiffs in the district court, request that a writ of certiorari issue to the United States Court of Appeals for the Eleventh Circuit to review that court's decision holding that sheriffs in Alabama are not final county policymakers in matters of law enforcement for purposes of county liability under 42 U.S.C. § 1983.

OPINIONS BELOW

The November 3, 1993 opinion of the Eleventh Circuit is reported as *Swint v. City of Wadley, Alabama*, 5 F.3d

1435 (11th Cir. 1993), and is reproduced in the appendix to this petition, p. 1a. The January 18, 1994 opinion of the Eleventh Circuit on rehearing is reported as *Swint v. City of Wadley, Alabama*, 11 F.3d 1030 (11th Cir. 1994), and is reproduced in the appendix, p. 41a. The June 2, 1992 and June 26, 1992 decisions of the United States District Court for the Middle District of Alabama are unreported and are reproduced in the appendix, p. 45a and 70a.

JURISDICTION

The opinion of the Eleventh Circuit was issued on November 3, 1993. Upon a suggestion for rehearing en banc, the panel issued a further opinion on January 18, 1994, modifying its prior opinion and announcing that the suggestion for rehearing en banc was denied. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The federal statute involved is 42 U.S.C. § 1983. Article V, § 138 of the Alabama Constitution is relevant, as are various provisions of the Alabama Code, including §§ 36-22-2, 36-22-3, 36-22-5, 36-22-6, 36-22-13, 36-22-16, 36-22-17, 36-22-18, 36-22-19, 36-22-42, 11-1-11, and 11-2-30. All of these provisions are set out verbatim in the appendix, p. 74a.

STATEMENT OF THE CASE

This case stems from two law enforcement raids on a nightclub in Chambers County, Alabama, known as the Capri Club. The plaintiffs in the case, who are petitioners in this Court, are two of the owners of the club, a club employee, and a club patron. Pet. App. 3a-4a; 5 F.3d at 1439.

Because of allegations that narcotics transactions had taken place at the club, the Sheriff of Chambers County organized and authorized a raid involving 30 to 40 officers from various localities and law enforcement agencies. It occurred on December 14, 1990. An undercover officer went in the club and purchased marijuana and other drugs. This officer then left the club and signaled the others. The raid began with eight SWAT team officers dressed in black, some wearing ski masks, followed immediately by the rest of the 30-40 member task force. The person who sold the drugs was identified and arrested. Task force officers pointed their guns at some of the citizens inside the club, including some of the plaintiffs, searched the cash register and door receipts, and confiscated currency from the door receipts. People in the club were not allowed to leave or go to the restroom for the next sixty to ninety minutes while the task force occupied the establishment. Only two people were found to be involved in narcotics and arrested, the person who sold the narcotics to the undercover officer and that person's brother, who had some of the marked money from the sale in his pocket. Pet. App. 4a-6a; 5 F.3d at 1440.

A second raid took place a little over three months later, again authorized by the Chambers County Sheriff. It was on March 29, 1991, and started again with an

undercover purchase of drugs in the club, followed by a similar raid which, again, lasted sixty to ninety minutes with little respite for those inside. During the raid, task force members chambered rounds of ammunition in their guns and pointed the guns at citizens in the club, ordering them to the floor. A shotgun was pointed at the face of one of the plaintiffs by an officer whose finger was on the trigger. Another plaintiff was held at gunpoint much of the time. Some of the citizens were searched, including one of the plaintiffs, who was pushed outside the club, grabbed, shoved against a wall, and searched. Another citizen was pushed off a bar stool. No one was arrested during this second raid. Pet. App. 6a; 5 F.3d at 1440.

During one of the raids, at least one officer said they would keep coming back until the club was closed. No other law enforcement operation of this kind had been conducted in the twenty-one year tenure of the sheriff of Chambers County. Pet. App. 7a; 5 F.3d at 1440.

As a result of the raids, the plaintiffs filed their complaint in the district court and included claims under 42 U.S.C. § 1983. Jurisdiction to hear the federal claims existed under 28 U.S.C. § 1331 and § 1343. The defendants were the Chambers County Commission, the Chambers County Sheriff's Department, Chambers County Sheriff James C. Morgan (officially and individually), the City of Wadley, Alabama (whose officers and chief were involved in the raid), Wadley Police Chief Freddie Morgan (officially and individually), and Officer Gregory Dendinger (officially and individually). Motions to dismiss were granted in part and denied in part, and are not challenged here. Motions for summary judgment also were

granted in part and denied in part. A motion for summary judgment by the Chambers County Commission was denied. Pet. App. 1a-2a, 8a; 5 F.3d at 1439, 1441.

Because some of the denials of summary judgment involved issues of qualified immunity, some of the defendants appealed pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The Chambers County Commission was one of those who appealed and, even though its claim did not involve qualified immunity, the Eleventh Circuit reviewed the County Commission's appeal, along with the appeals of some of the other defendants, under what the Court called its discretionary "pendent appellate jurisdiction." Pet. App. 30a-31a; 5 F.3d at 1449-1450.

According to the County's motion, it could not be held liable for the actions of the Sheriff because he is not a final policymaker for the County in the area of law enforcement. The Eleventh Circuit agreed and reversed, holding that summary judgment should be granted in the County Commission's favor. In its November 3, 1993 opinion, the Eleventh Circuit noted that, under Alabama law, a sheriff is considered an officer of the state and not an employee of the county. The Court also pointed out that this is not dispositive, and that an Alabama sheriff can be considered a final county policymaker under § 1983 – even though the sheriff is an officer of the state – in at least some areas of the sheriff's responsibilities. Pet. App. 32a-33a; 5 F.3d at 1450, *citing, Parker v. Williams*, 862 F.2d 1471, 1478-1479 (11th Cir. 1989). However, the Court went on to say that law enforcement is not one of those areas for which a county can be held liable for a sheriff's actions. According to the Court, the county has no responsibilities for law enforcement independent of those

exercised by the sheriff. "[B]ecause the State has not assigned the counties any law enforcement authority, the sheriff is not exercising county power when he authorizes a raid on suspected criminal activity within his county." Pet. App. 33a-34a; 5 F.3d at 1451.

> We hold that Sheriff Morgan is not the final repository of Chambers County's general law enforcement authority, because it has none. Therefore, the County Commission is not liable for the Sheriff's law enforcement actions under 42 U.S.C. § 1983, and it is entitled to summary judgment on the § 1983 claims.

Pet. App. 34a; 5 F.3d at 1451.

On January 18, 1994, the Eleventh Circuit issued a decision modifying its earlier opinion with respect to one of the individual defendants on an issue that is not relevant here. Pet. App. 41a; 11 F.3d 1030. This petition follows. It seeks review only of the Eleventh Circuit's decision regarding county liability, and does not involve issues regarding the liability of other defendants.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *PEMBAUR V. CINCINNATI*, 475 U.S. 469 (1986).

In *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), this Court held that local governmental liability can be imposed under Section 1983 for the single action of a local governmental policymaker if that person has final policymaking authority such that his or her "acts or

edicts may fairly be said to represent official policy." 475 U.S. at 480, *quoting, Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978). *Pembaur* involved a suit against several defendants, including a county in Ohio, because of an unconstitutional entry and search of the plaintiff's business. One of the alleged grounds for county liability was that the sheriff's unconstitutional actions were those of a final county policymaker. Justice Brennan's opinion in *Pembaur* made it clear that "decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to [local governmental] liability." 475 U.S. at 483, n. 12 (emphasis in original). In *Pembaur*, this Court affirmed the conclusion of the Sixth Circuit Court of Appeals that the sheriff in that case could act as a final county policymaker with respect to law enforcement. 475 U.S. at 484.

The portion of the Sixth Circuit's opinion on the matter – explicitly affirmed in this respect by this Court – stated that, under Ohio law, the sheriff is elected by the residents of the county, serves as chief law enforcement officer of the county, receives his office, books, furniture, and other materials from the county, and receives his salary and training expenses from the county. Because of these factors, the Sixth Circuit held that the sheriff is a final policymaker for the county with respect to the law enforcement activities at issue, *Pembaur v. Cincinnati*, 746 F.2d 337, 341 (6th Cir. 1984), and this Court affirmed on that point. 475 U.S. at 484.

Similarly, under Alabama law, the sheriff is elected by the residents of the county, serves as chief law enforcement officer for the county, receives his office, books, furniture, and other materials from the county, and

receives his salary and expenses from the county. Ala. Const. Art. V, § 138; Ala. Code §§ 36-22-3, 36-22-5, 36-22-16, 36-22-18. There is nothing of relevance to distinguish the Alabama sheriff from the Ohio sheriff in *Pembaur.*

While the Eleventh Circuit in the present case noted that sheriffs are considered state officials under Alabama law, the Eleventh Circuit also made it clear that this point was not dispositive. Instead, the Eleventh Circuit based its ruling on the fact that Alabama counties have no law enforcement authority independent of the sheriff. Pet. App. 32a-34a; 5 F.3d at 1450-1451. Neither this Court's opinion nor the Sixth Circuit's opinion in *Pembaur* pointed to any independent law enforcement authority of Ohio counties or suggested the issue was relevant. It is not as if county governing boards in Ohio directly supervise the law enforcement activities of their sheriffs or ride around with the sheriffs in the patrol cars.

Thus, on the relevant factors, there is little to distinguish Alabama from Ohio, and the decision below conflicts with this Court's decision in *Pembaur.*

II. THE DECISION BELOW CONFLICTS WITH HOLDINGS OF THE COURTS OF APPEAL FOR THE FIRST, FIFTH, AND NINTH CIRCUITS.

As noted previously, the Eleventh Circuit in this case held that the County cannot be held liable for the Sheriff's actions because the Sheriff exercises law enforcement authority alone and the County has no law enforcement authority independent of the Sheriff. Of course, as previously noted, counties in Alabama provide the offices and

control the salaries and expenses for the sheriffs to perform law enforcement activities. In that sense, then, counties in Alabama, as in most states, have law enforcement authority. Moreover, contrary to the Eleventh Circuit's analysis, the fact that no other county officials supervise the sheriff or directly engage in law enforcement actually *supports* county liability because it demonstrates that the sheriff is the "final" policymaker with "final authority" to establish policy in that area for the local government. *Pembaur v. Cincinnati,* 475 U.S. at 481. On this basis, at least three other circuits – the First, the Fifth, and the Ninth – have reached conclusions on this issue that are directly at odds with the Eleventh Circuit. Because the case law from the Fifth Circuit is the most extensive, it will be discussed first.

In *Turner v. Upton County,* 915 F.2d 133 (5th Cir. 1990), the Fifth Circuit held that counties in Texas can be liable for the law enforcement actions of sheriffs. The plaintiff in *Turner* sued a sheriff and the county because the sheriff allegedly trumped up a sham prosecution against her. Although the federal district court granted summary judgment for the county, concluding it was not liable for the sheriff's actions, the Fifth Circuit reversed. Because of its relevance, the Fifth Circuit's discussion is quoted at length:

> It has long been recognized that, in Texas, the county sheriff is the county's final policymaker in the area of law enforcement, not by virtue of delegation by the county's governing body but, rather, by virtue of the office to which the sheriff has been elected:

> Because of the unique structure of county government in Texas . . . elected county officials, such as the sheriff . . . hold [] virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein. . . . Thus, at least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered those of one "whose edicts or acts may fairly be said to represent official policy" for which the county may be held responsible under section 1983.

Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980) (quoting *Monell*, 436 U.S. at 694, 98 S.Ct. at 2037, citations omitted); *see Bennett v. City of Slidell*, 728 F.2d 762, 796 (5th Cir. 1984) (en banc), *cert denied*, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985). Among other responsibilities he is charged with preserving the peace in his jurisdiction and arresting all offenders. Tex.Code Crim.P. arts. 2.13, 2.17. [He is] the county's final policymaker in this area. . . . [His duties] include the investigation of crimes, the collection of evidence thereof, and the presentation of this evidence to the district attorney for purposes of determining the appropriateness of prosecution. . . .

> The sheriff is an elected county official equal in authority to the county commissioners within that jurisdiction; his actions are as much the actions of the county as the actions of those commissioners.

Turner, 915 F.2d at 136-137.

Like the Texas sheriff in *Turner*, the Alabama sheriff is charged with preserving the peace in his or her county and arresting all offenders, investigating crimes, collecting evidence, and presenting evidence to the district attorney. Ala. Code, § 36-22-3. To use the words from *Familias Unidas*, as quoted in *Turner*, the Alabama sheriff holds "virtually absolute sway over the particular tasks or areas entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein." *Turner*, 915 F.2d at 136, *quoting Familias Unidas*, 619 F.2d at 404.

In *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), the Fifth Circuit was called upon to examine the policymaker status of an Arkansas county sheriff. In holding the sheriff to be a final policymaker for purposes of county liability, the Fifth Circuit said:

> Under Arkansas law, a county sheriff, in the execution of the statutory duty to perform law enforcement activities in and for the county, is solely responsible for the procedures and practices of the department; there is no legislative or other higher body, beyond a court of law, to which the sheriff answers.

884 F.2d at 828 (citation omitted). This is also true of a county sheriff in Alabama. Just as the sheriff was held to be a final county policymaker in *Crowder* for purposes of the investigation, search, and seizure at issue in that case, so is the Sheriff in Chambers County, Alabama, a final county policymaker for purposes of the unlawful raid at issue in this case.

As previously noted, the Eleventh Circuit in the decision below pointed out that Alabama sheriffs are considered state officers under Alabama law, but added that this

fact was not dispositive. Pet. App. 32a-33a; 5 F.3d at 1450. If, however, this in some way accounts for the decision below, the Eleventh Circuit would be in conflict with the Fifth Circuit on this score. In *Crane v. Texas*, 766 F.2d 193 (5th Cir.), *cert. denied*, 474 U.S. 1020 (1985), the Fifth Circuit held a Texas county liable for actions of a district attorney, despite the county's contention that the district attorney is technically a state official under Texas law. With respect to the district attorney, the Fifth Circuit said, "much like the county itself, his office is a local entity, created by the State of Texas and deriving its powers from those of the State, but limited in the exercise of those powers to the county, filled by its voters, and paid for with its funds." *Id.* at 195. The Court added: "[E]ven were he a State official in every sense, called so in State law and designated by the State to make policy for its other creature, the county, our answer would likely remain the same; county responsibility for violation of the Constitution cannot be evaded by such ingenious arrangements." *Id.* Similarly, the Alabama sheriff, although technically called an officer of the state under state law and deriving power from state statutes, is limited in the exercise of that power to the county, is elected by the county's voters, and is paid for by the county's funds.

With respect to the First Circuit, that Court held in *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985), that Massachusetts sheriffs can be final county policymakers regarding jail policies even though they have complete control over those policies with no involvement of other county officials. *Id.* at 571.

> What the County misunderstands is that it is not because county officials *other than the Sheriff* were "involved" in the promulgation of the strip search rule, that it is liable under *Monell*, nor is it because county officials failed properly to "oversee" the Sheriff. Rather, it is liable because the Sheriff was the county official who was elected by the County's voters to act for them and to exercise the powers created by state law. Accordingly, the Sheriff's strip search policy *was* Plymouth County's policy, and the County must respond in damages for any injuries inflicted pursuant to that policy.

Id. (emphasis in original).

Finally, the Ninth Circuit in *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989), rejected the same reasoning that motivated the Eleventh Circuit's decision in this case. *Gobel* involved a suit against an Arizona county attorney for initiating and publicizing an arrest without probable cause. The district court there dismissed on the theory that the county attorney was simply enforcing state law independent of the county. The Ninth Circuit reversed, citing both *Blackburn v. Snow* from the First Circuit and *Crane v. Texas* from the Fifth Circuit, and held that dismissal was inappropriate in light of the fact that county attorneys were elected by county voters, were county officers, and exercised their responsibilities within their counties on budgets set by the counties. 867 F.2d at 1208-1209.

These decisions from the Fifth, First, and Ninth Circuits make it clear that the absolute power held by an official, such as a sheriff, in a particular area of responsibility, such as law enforcement, does not absolve a county from liability for that official's actions. Alabama is no different from the states involved in those cases, or

most other states for that matter, in terms of the relationship between the sheriff and county. It is not as if the law enforcement actions of the sheriffs in those other states are subject to participation, supervision, or review by county governing boards. Indeed, the fact that the law enforcement power is held independent of other county officials demonstrates that the sheriff is a *final* county policymaker. Moreover, as the *Crane* decision from the Fifth Circuit illustrates, the label of the official as a "state" or "county" official is unimportant. What is important is whether the official is elected by voters of the county, exercises power only within the county, and is supported by county funds. Clearly, in Alabama, as in most other places, the sheriff is elected by voters of the county, exercises law enforcement power within the county, and is supported by county funds for law enforcement activities. Under the approaches of the Fifth, First, and Ninth Circuits, county liability would exist. The decision below by the Eleventh Circuit is in conflict.

III. THIS CASE RAISES AN IMPORTANT ISSUE OF FEDERAL LAW.

This is an important issue of federal law. A number of cases are brought against local governments under § 1983, in Alabama and elsewhere, for the actions of high officials, particularly in the area of law enforcement. The theory employed by the Eleventh Circuit is not necessarily limited to Alabama, but could be used in any state where certain officials, such as sheriffs, have absolute sway over particular areas, such as law enforcement, independent of other county officials. Indeed, under the

Eleventh Circuit's theory, counties in most states would never be liable for constitutional violations committed in the arena of law enforcement. For these reasons, the decision below severely restricts the remedies available to citizens under § 1983. Also, enough complexity already exists in the interpretation of § 1983 without the added confusion and conflict created by the Eleventh Circuit's interpretation.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the petitioners request that a writ of certiorari issue to review the decision of the Eleventh Circuit in this case.

Respectfully Submitted,

ROBERT B. MCDUFF*
771 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

CARLOS A. WILLIAMS
Post Office Box 306
Mobile, Alabama 36601
(205) 434-2478

BRYAN STEVENSON
114 North Hull Street
Montgomery, Alabama 36104
(205) 269-1803

Counsel for Petitioners

*Counsel of Record

APPENDIX

Tom SWINT; Tony Spradley; Drecilla James and Jerome Lewis, Plaintiffs-Appellees,

v.

The CITY OF WADLEY, ALABAMA; Freddie Morgan and Gregory Dendinger in their official and individual capacities; Chambers County Commission, Defendants-Appellants,

Chambers County Sheriff's Department, Defendant

James C. Morgan, In his official and individual capacity, Defendant-Appellant.

No. 92-6574.

United States Court of Appeals, Eleventh Circuit.

Nov. 3, 1993.

Appeal from the United States District Court for the Middle District of Alabama.

Before TJOFLAT, Chief Judge, CARNES Circuit Judge, and BRIGHT*, Senior Circuit Judge.

CARNES, Circuit Judge:

This civil rights case, involving allegations of police misconduct, was filed by four citizens against the City of Wadley, Alabama, the Chambers County Commission, and three individual defendants: Wadley Police Chief Freddie Morgan, Officer Gregory Dendinger, and Chambers County Sheriff James C. Morgan. Before us is the

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* Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

appeal of Chief Morgan, Officer Dendinger, and Sheriff Morgan from the district court's denial of their qualified immunity summary judgment motions. Also before us is the request by the City of Wadley and the Chambers County Commission that we exercise jurisdiction under either the collateral order or pendent appellate doctrines to review the district court's denial of their summary judgment motions. The City contends the district court should have held that the Chief of Police did not have final decisionmaking authority over the relevant actions, and thus the City was not liable for his conduct. Similarly, the County Commission contends the court should have held that under Alabama law the Sheriff was not the final repository of county law enforcement authority, and thus the County was not liable for his actions. The City, Chief Morgan, and Officer Dendinger also urge us to review under either the collateral order or pendent appellate jurisdiction doctrine, the district court's denial of their summary judgment motion as to the state law claims against them.

We affirm the district court's denial of the individual defendants' qualified immunity summary judgment motions insofar as the Fourth Amendment and equal protection claims are concerned, but reverse the denial as to the due process claims. We exercise our pendent appellate jurisdiction over and reverse the denial of the County Commission's summary judgment motion. We hold that jurisdiction to review the rulings on the denial of the other motions for summary judgment does not exist under the collateral order doctrine, and we decline to exercise pendent appellate jurisdiction to review those rulings.

I. BACKGROUND

A. STATEMENTS OF FACTS

In considering the denial of a defendant's summary judgment motion, we are required to view the facts, which are drawn from the pleadings, affidavits, and depositions, in the light most favorable to the plaintiffs. *E.g., Hardin v. Hayes*, 957 F.2d 845, 848 (11th Cir.1992); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1503 (11th Cir.1990). Any qualified immunity defenses that do not result in summary judgment before trial may be renewed at trial, where the actual facts will be established. *Compare Adams v. St. Lucie County Sheriff's Dep't*, 962 F.2d 1563, 1567 n. 2(11th Cir.1992) (non-majority opinion of Hatchett, J.) (dictum) *with id.* at 1579 n. 8 (dissenting opinion of Edmondson, J.) (dictum).[1] Thus, what we state as "facts" in this opinion for purposes of reviewing the rulings on the summary judgment motions may not be the actual facts. They are, however, the facts for present purposes, and we set them out below.

This lawsuit stemmed from two law enforcement raids on the Capri Club ("the Club"), a nightclub located in Chambers County, Alabama. Although outside any city limits, the Club is within the police jurisdiction of the City of Wadley, a community located in Randolph

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[1] No majority opinion was issued by the panel in *Adams*. Two of the panel members did concur in the judgment affirming the denial of summary judgment on qualified immunity grounds. Judge Edmondson dissented. The en banc court reversed, "[o]n reasoning set out in the dissenting opinion of Judge Edmondson." *Adams v. St. Lucie County Sheriff's Department*, 998 F.2d 923 (11th Cir.1993) (en banc) (per curiam).

County, Alabama. Plaintiffs Tom Swint and Tony Spradley are owners of the Club; plaintiff Drecilla James is a Club employee who was present during both of the raids; Jerome Lewis is a Club patron who was present during the second raid. All four plaintiffs are black. The three individual defendants – Chief Morgan, Officer Dendinger, and Sheriff Morgan – are all white. Each was sued in both his official and individual capacities. The Chambers County Commission and the City of Wadley are the other defendants.

In response to complaints that drug transactions were being conducted in the Club, the Chambers County Sheriff's Department and the City of Wadley Police Department engaged in a preliminary narcotics investigation of the Club. This investigation culminated in a recommendation from Chambers County Sheriff's Investigator Timothy Birchfield to Sheriff Morgan for a raid on the Club. Sheriff Morgan "approved the narcotics investigation and operation at the Club."

The raid was conducted by the Chambers County Drug Task Force consisting of units from the Chambers County Sheriff's Department and the police departments of the cities of Lafayette, Lanett, and Valley, Alabama. Joining the Task Force for this operation were representatives of the City of Wadley Police Department and the Alabama Alcoholic Beverage Control Board. The total strength assembled by the Task Force for the raid was 30 to 40 law enforcement officers. In accordance with the operation plan apparently devised by Investigator Birchfield, an undercover officer and a confidential informant entered the Club on December 14, 1990 while the other task force members remained out of sight.

While inside, the undercover officer was offered marijuana and crack cocaine for sale by a patron of the Club. After purchasing these drugs, the officer left the Club and signaled for the raid to begin.

Initial entry of the Club was made by the City of Lanett, Alabama, SWAT team consisting of approximately eight officers. The team was dressed in black and at least some of the members wore ski masks to conceal their identities. Within 30 seconds of the SWAT team's entry, the other members of the task force entered. The person who had sold the undercover officer drugs was identified and arrested. The task force officers pointed their weapons at plaintiffs Spradley and James and others who were present. Participants in the raid searched the Club's cash register and door receipts, and some currency was confiscated from the door receipts. Persons inside the Club were prohibited from moving or leaving until the raid, which lasted one to one and one-half hours, was over. Those present were not allowed to go to the restroom. When one man asked for permission, Officer Dendinger replied, "Shut up, or I'll shut you up myself." When plaintiff James told Chief Morgan that she was so scared that she had to go to the restroom, he said no. Another officer also refused her request to use the Club's restroom facilities, telling her she would have to go behind the building. During this first raid, illegal liquor was seized by an Alabama Alcohol Beverage Control Board officer who participated in the raid, and several minors were found inside the Club. Only two people were arrested during this entire raid: the man who sold the undercover officer drugs; and that man's younger brother, a minor, who had in his possession some of the

marked money the undercover agent had paid for the drugs.

After the December 14, 1990 raid, additional narcotics-related complaints were received by the Chambers County Sheriffs Department. In response, Sheriff Morgan directed that Birchfield investigate activities at the Club to ascertain whether a second operation was required. Birchfield investigated and recommended another operation; Sheriff Morgan authorized it.

The second raid was conducted on March 29, 1991, and it was virtually identical in procedure to the first. Again, an undercover agent went inside first and purchased drugs. After the premises were secured this time however, the task force participants could not find the man who had sold drugs to the undercover officer. During this second raid law enforcement officials chambered rounds of ammunition into their weapons, pointed them, and ordered persons in the Club to get down on the floor. Some of those present in the Club during this raid were searched including plaintiff Lewis. During the process of being searched, Lewis was pushed outside the Club, grabbed, and shoved against a wall. After being searched, Lewis was forced to go back inside the Club until the raid was concluded. Another patron was pushed off a bar stool. Some of the employees, including plaintiff James, had guns held on them during this raid, which lasted from one to one and one-half hours. At one point, an officer, with his finger on the trigger, pointed a shotgun at Lewis' face. No one was arrested during or because of this second raid.

During one of the raids, an unidentified officer said they would be coming back and would not stop until the Club was closed. No other law enforcement operation of this nature had been conducted during Sheriff Morgan's twenty-one year tenure as Sheriff of Chambers County. Chief Morgan and Officer Dendinger personally participated in both raids. Sheriff Morgan was not physically present during either raid, but he authorized both of them.

B. COURSE OF PROCEEDINGS

The plaintiffs' complaint, which seeks declaratory, injunctive, and compensatory relief, avers the following four counts[2]:

> Count I: Deprivation of Civil Rights, 42 U.S.C. §§ 1981, 1983 and 1985 for violations of plaintiffs' rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments;
>
> Count II: Conspiracy to deny plaintiffs' constitutional rights;
>
> Count III: Pendent state claims alleging assault and false imprisonment;
>
> COUNT IV: Pendent state claims alleging negligence.

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[2] In the introduction to their complaint, plaintiffs refer to a violation of their rights guaranteed under the Thirteenth Amendment. However, plaintiff's indicated in a pretrial conference that they would not pursue the Thirteenth Amendment claim; the district court, therefore, regarded this claim as abandoned and declined to address it. So do we.

All the defendants moved to dismiss, and their motions were granted in part and denied in part by the district court. Citing *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989), the district court dismissed the 42 U.S.C. § 1981 claims against all defendants. The court dismissed on Eleventh Amendment grounds the claims against Sheriff Morgan in his official capacity to the extent plaintiffs seek money damages. The court also dismissed the complaint against the Chambers County Sheriff's Department. None of those dismissals is before us for review.

All remaining defendants filed motions for summary judgment. In response, the district court granted judgment against the plaintiffs as follows:

> 1. On Count I insofar as the plaintiffs claimed a right under the Sixth Amendment to be informed of the accusations against them;
>
> 2. On Count II insofar as the plaintiffs claimed a right to association, speech and movement;
>
> 3. On Counts III and IV as to the Chambers County Commission;
>
> 4. On Count III as to Sheriff Morgan;
>
> 5. On Count III as to the City on the claims of false imprisonment only; and
>
> 6. On Count IV as to Officer Dendinger.

In all other respects, the defendants' motions for summary judgment were denied.

II. DISCUSSION

A. THE INDIVIDUAL DEFENDANTS' APPEAL OF THE DENIAL OF SUMMARY JUDGMENT ON QUALIFIED IMMUNITY GROUNDS

1. *Qualified Immunity Law*

The district court denied the three individual defendants' motions for summary judgment on qualified immunity grounds. The denial of qualified immunity is a question of law to be reviewed *de novo*. *Hardin v. Hayes*, 957 F.2d 845, 848 (11th Cir.1992). In addition, "when a defendant moves for summary judgment based on the doctrine of qualified immunity, the court must view the facts in the light most favorable to the plaintiff." *Id.* The rudiments of the qualified immunity defense are well established:

> When a plaintiff sues a municipal officer in the officer's individual capacity for alleged civil rights violations, the plaintiff seeks money damages directly from the individual officer. If sued "individually," a municipal officer may raise an affirmative defense of good faith or "qualified," immunity.

Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir.1991) (citations omitted). The test for qualified immunity was announced by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982):

> [G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818, 102 S.Ct. at 2738.

Although the cases sometimes refer to the doctrine of qualified "good faith" immunity, the test is one of objective legal reasonableness, without regard to whether the government official involved acted with subjective good faith. *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir.1991). "[W]e look to whether a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred." *Hardin*, 957 F.2d at 848. Thus, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Courson*, 939 F.2d at 1487 (*Quoting Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986)).

In conducting the objective legal reasonableness inquiry, this Court has defined the following framework for analysis:

> In *Zeigler v. Jackson*, [716 F.2d 847, 849 (11th Cir.1983),] this Court established a two-step analysis to be used in applying the *Harlow* test; the defendant government official must prove that "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred," and then the burden shifts to the plaintiff to demonstrate that the defendant "violated clearly established constitutional law."

Sammons v. Taylor, 967 F.2d 1533, 1539 (11th Cir.1992). The plaintiffs do not contest that the individual defendants were acting within their discretionary authority when they authorized or participated in the two raids. Thus, the first step of the analysis is satisfied.

The dispute is over the second step of the analysis: whether the rights alleged to have been violated were "clearly established" law at the time of the action. The Supreme Court has revisited this question a number of times:

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) (citations omitted). This Court has previously explained:

> [T]here are two questions of law that we must decide in completing the second step of the *Zeigler* analysis: ascertainment of the law that was clearly established at the time of the defendant's action, and a determination as to the existence of a genuine issue of fact as to whether the defendant engaged in conduct violative of the rights established by that clearly-established law.

Rich v. Dollar, 841 F.2d 1558, 1564 (11th Cir.1988). The *Rich* Court elaborated on the "common situations" that can arise in connection with the "clearly established" inquiry:

> The parties can in a given case make factual showings regarding the acts or omissions of the defendants which create genuine fact issues as to precisely what the defendant's course of conduct was in the given situation. However, these factual disputes do not preclude a grant of summary judgment premised on a defendant's qualified immunity if the legal norms allegedly violated were not clearly established at the time of the challenged actions. Thus, in the context of a § 1983 case, summary judgment would be appropriate as a matter of law, notwithstanding factual disputes on the record regarding the defendant's conduct.

Id. at 1564-65. The Court went on to discuss the flip side of this coin:

> To complete the point made here, we also recognize that if the legal norms allegedly violated were as a matter of law clearly established at the appropriate time, a genuine fact issue as to what conduct the defendant engaged in would preclude a grant of summary judgment based upon qualified immunity. In this latter situation the denial or grant of summary judgment turns on the second question of law identified in *Mitchell [v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), i.e., do the showings reveal a genuine issue of material fact as to whether the defendant's conduct violated the right accruing to the plaintiff under clearly established law.

Id. at 1565.

2. *The Constitutional Norms Relied Upon By Plaintiffs*

The district court granted defendants' summary judgment on qualified immunity grounds as to the First and Sixth Amendment claims, but denied it as to the Fourth Amendment, due process, and equal protection claims, concluding "that the law was clearly established in December, 1990, and in March, 1991" that the alleged conduct violated those constitutional provisions.

a. The Fourth Amendment Claims

The district court found that it was "clearly established . . . that a raid of a business establishment violates the Fourth Amendment unless based on probable cause and exigent circumstances. . . . " Indeed it was. Well before the events of December 1990 and March 1991, this Court observed:

> The basic premise of search and seizure doctrine is that searches undertaken without a warrant issued upon probable cause are "*per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions."

United States v. Alexander, 835 F.2d 1406, 1408 (11th Cir.1988) (quoting *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967)). Long before the raids at issue in this case, the Supreme Court, summarizing preexisting law, noted that "[a]bsent consent or exigent circumstances, a private home may not be entered to conduct a search or effect an arrest without a warrant." *Donovan v. Dewey,* 452 U.S. 594, 598 n.6, 101 S.Ct. 2534,

2538 n. 6, 69 L.Ed.2d 262 (1981). The Court specifically added that "these same restrictions pertain when commercial property is searched for contraband or evidence of crime." *Id.* Our cases have stressed that:

> [o]nly in the face of "exigent circumstances," where obtaining a warrant would greatly compromise important law enforcement objectives, does the warrant requirement yield. When exigent circumstances coexist with probable cause, the Fourth Amendment has been held to permit warrantless searches and seizures.

United States v. Pantoja-Soto, 739 F.2d 1520, 1523 (11th Cir.1984) (citations omitted), *cert. denied*, 470 U.S. 1008, 105 S.Ct. 1369, 84 L.Ed.2d 389 (1985).

Defendants argued before the district court that "[t]he search in the case here was pursuant to probable cause and exigent circumstance[s]. . . . " Probable cause, a pure question of law, "exists when under the 'totality-of-the-circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.' " *United States v. Tobin*, 923 F.2d 1506, 1510 (11th Cir.) (en banc) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983)), *cert. denied*. ___ U.S. ___, 112 S.Ct. 299, 116 L.Ed.2d 243 (1991). In other words, "facts [which would] lead a reasonably cautious person to believe that the 'search will uncover evidence of a crime' " will support a finding of probable cause. *United States v. Burgos*, 720 F.2d 1520, 1525 (11th Cir.1983) (quoting *United States v. Rojas*, 671 F.2d 159, 165 (5th Cir. Unit B 1982)).

Nonetheless, the question for purposes of the individual defendants' qualified immunity defense is not

whether probable cause actually existed. Instead, "[w]hen a law enforcement officer seeks summary judgment on the basis of qualified immunity, we only must ask whether, viewing the facts in a light favorable to the nonmovant, there was *arguable* probable cause." *Moore v. Gwinnett County*, 967 F.2d 1495, 1497 (11th Cir. 1992) (emphasis in original), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1049, 122 L.Ed.2d 357 (1993). Thus, we determine "whether reasonable officers in the same circumstances and possessing the same knowledge as the Defendants could have believed the probable cause existed." *Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir.1990); *accord Moore*, 967 F.2d at 1497-98. In *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the Supreme Court acknowledged that "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and . . . that in such cases those officials . . . should not be held personally liable." *Id.* at 641, 107 S.Ct. at 3039-40; *accord Von Stein*, 904 F.2d at 579.

Based on the record before us, read in a light favorable to the plaintiffs, we cannot conclude that the individual defendants had even arguable probable cause to conduct the extensive raids of the Club, which included a search of the premises, the seizure of all employees, patrons, and owners present, and the search of some of those who were detained. Stated somewhat differently, law enforcement officers in the position of these individual defendants could not reasonably have concluded that adequate probable cause existed to justify the searches and seizures that occurred. Chief Morgan testified in deposition that approximately a month before the first

raid, he had received information from a reliable confidential informant regarding the sale of narcotics inside the Club. Chief Morgan noted that this source had previously assisted authorities in obtaining convictions of other suspects. According to Chief Morgan, the informant identified several individuals allegedly involved in the sale of drugs. Likewise, Sheriff Morgan testified that he relied on information from a reliable informant in authorizing the March 29, 1991 raid. However, none of those persons identified by these informants were owners or employees of the Club; therefore, the search of the Club's cash register and door receipts was presumptively unreasonable. Moreover the defendants have offered no evidence that all of the patrons of the Club who were detained at gunpoint and randomly searched were previously identified as engaged in the narcotics trade, or that the defendants had any reason whatsoever to believe that all of the patrons were involved in illegal activity. Absent such evidence or reason to believe, there was not even arguable probable cause to seize and detain every patron and employee of the Club for an hour and a half and search many of those present.

Defendants direct our attention to the consummated drug transactions that preceded each of the raids. Immediately before each raid, an undercover agent did complete a single drug buy from one person inside the Club. There is no question that probable cause existed to arrest and search the narcotics peddler on each of the two occasions. Within minutes of the entry of the SWAT team and other members of the task force at the beginning of the December 14, 1990 raid, the drug seller was identified, arrested, and removed from the premises. After

entry during the March 29, 1991 raid, officers attempted in vain to identify and find the one who had sold drugs to the undercover officer a few minutes earlier. If that had been the extent of the intrusion on these two occasions, this would be a different case. But that was not the end of the intrusion. On the contrary, the officers proceeded to detain at gunpoint dozens of citizens for an hour and a half, search a number of them, and search the premises as well. In the process, the officers completely disrupted the business of the Club. All of this was done without even arguable probable cause to justify anything beyond the search and arrest of a single individual on each occasion.

Defendants have cited no authority that even suggests that the search and seizure of one suspect in a public place can be bootstrapped into probable cause for a broad-based search of the business establishment and its patrons. More than a decade before the raids in this case, the Supreme Court clearly established the constitutional impropriety of what was done in this case. In *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), the Illinois Bureau of Investigation obtained a search warrant authorizing the search of the Aurora Tap Tavern and of the person of the bartender. In the ensuring search, one officer proceeded to pat down each of the nine to thirteen customers in the tavern. In the course of the patdown a patron Ventura Ybarra, heroin was found. The Supreme Court reversed the resulting conviction on Fourth Amendment grounds with an observation that could have been penned for this case as well: "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.* at 91, 100

S.Ct. at 342. The Fourth Amendment, declared the Court, affords "individualized protection":

> Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places.

Id. (Citing *Rakas v. Illinois*, 439 U.S. 128, 138-43, 148-49, 99 S.Ct. 421, 427-30, 433, 58 L.Ed.2d 387 (1978); *Katz v. United States*, 389 U.S. 347, 351-52, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967)). Each citizen is "clothed with constitutional protection against an unreasonable search or an unreasonable seizure," *id.* and does not shed that protection at the door of the Tap Tavern in Aurora, Illinois, or at the door at the Capri Club in Wadley, Alabama. Probable cause to arrest one suspect, and even probable cause to believe that a number of other or unidentified people had sold drugs in the establishment in the past, did not give the officers *carte blanche* to seize everyone who happened to be in the Club when the two raids took place.

We believe it was equally clear in December of 1990 that the arrest of the one person who had sold drugs to the undercover officer did not entitle the officers to search the entire premises in which he was located. The permissible scope of searches incident to arrests was defined by the Supreme Court in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969):

> Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here [of the defendant's entire home subsequent to his arrest] went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area.

Id. at 768, 89 S.Ct. at 2043. The defendants had no warrant to search the Club and seize its occupants; they lacked even arguable probable cause to engage in such conduct; and their activities exceeded the bounds of a lawful search incident to an arrest. Under law that had been clearly established years before, the actions alleged to have occurred during the two raids violated the Fourth Amendment. No reasonable law enforcement officer in the circumstances presented here could have believed that probable cause existed to search the entire Club and seize all of its occupants.

Defendants place great weight on their contention that exigent circumstances justified the broad search and seizures that occurred during the raids on the Club. We have explained that "[t]he exigent circumstance doctrine provides that when probable cause has been established to believe that evidence will be removed or destroyed before a warrant can be obtained, a warrantless search and seizure can be justified." *United States v. Young*, 909 F.2d 442, 446 (11th Cir.1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 90, 116 L.Ed.2d 62 (1991). We need not address defendants' exigent circumstances argument, because it is well-settled that under this doctrine, "warrantless

searches and seizures . . . [require that] both probable cause and exigent circumstances exist." *United States v. Burgos*, 720 F.2d at 1525. Having concluded that the defendants lacked even arguable probable cause for anything beyond a search and seizure of the two suspects who had actually engaged in narcotics transactions, we find it unnecessary to decide whether a reasonable officer could have believed that sufficient exigent circumstances existed to excuse the warrant requirement if there had been probable cause to justify the actions that occurred.

Defendants argue there was no violation of plaintiffs' rights, because the two raids were administrative searches of the Club to which the Club owners had previously consented. Even in the context of administrative searches of business property, however, the Fourth Amendment limits warrantless searches: "[P]rior cases have established that the Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property." *Donovan v. Dewey*, 452 U.S. 594, 598, 101 S.Ct. 2534, 2537-38, 69 L.Ed.2d 262 (1981). While "legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment," *id.* at 598, 101 S.Ct. at 2538, pretextual administrative searches do:

> [T]he Fourth Amendment protects the interest of the owner of property in being free from *unreasonable* intrusions onto his property by agents of the government. Inspections of commercial property may be unreasonable if they are not authorized by law or are unnecessary for the furtherance of federal interests. Similarly, warrantless inspections of commercial property may

> be constitutionally objectionable if there occurrence is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials.

Id. at 599, 101 S.Ct. at 2538 (citations omitted) (emphasis in original). Thus, where an act authorizing administrative inspections "fails to tailor the scope and frequency of such administrative inspections to the particular" governmental concern, and "does not provide any standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search," a search warrant will be required. *Id.* at 601, 101 S.Ct. at 2539 (citing *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) (holding that absent consent a warrant was constitutionally required in order to conduct administrative inspections under § 8(a) of OSHA)).

The facts viewed favorably to plaintiffs simply will not support an administrative search theory. Administrative inspections conducted on the Club and its predecessor establishment both before and after the two raids at issue in this case were accomplished without the massive show of force and excessive intrusion witnessed in the December 1990 and March 1991 raids. Moreover, during the two raids the officers did not simply search for violations of the liquor laws by the establishment; instead, a number of people were searched for evidence of their violation of drug laws, searches to which they did not consent as part of any regulatory scheme. No reasonable officer in the defendants' position could have

believed that these were lawful, warrantless administrative searches.

Sheriff Morgan advances another argument on the question of whether a genuine issue of fact exists as to whether he "engaged in conduct violative of the rights established by . . . clearly-established law." *Rich*, 841 F.2d at 1564. Although Sheriff Morgan acknowledges that he authorized both of the raids on the Club, he nonetheless contends that he could not have violated plaintiffs' rights because he was not personally involved in conducting the raids. According to the Sheriff, "the focus must center on the actions taken by [him] and the information he possessed in taking those actions." This argument fails for at least two reasons. First, although § 1983 does require proof of an affirmative causal connection between the official's acts or omissions and the alleged constitutional deprivation, "[p]ersonal participation . . . is only one of several ways to establish the requisite causal connection." *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir.1986); *see also Sims v. Adams*, 537 F.2d 829, 831 (5th Cir.1976). Interpreting the Supreme Court's decision in *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), this Court has observed that "it is clear that the inquiry into causation must be a directed one, focusing on the duties and responsibilities of each of the individual defendants whose acts or omissions are alleged to have resulted in a constitutional deprivation." *Williams v. Bennett*, 689 F.2d 1370, 1381 (11th Cir.1982), *cert. denied*, 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983). Thus, personal participation is not the *sine qua non* for Sheriff Morgan to be found personally liable under § 1983. "[L]iability may be imposed due to the existence of an improper policy or

from the absence of a policy." *Rivas v. Freeman*, 940 F.2d 1491, 1495 (11th Cir.1991) (summarizing preexisting law); *see also Zatler*, 802 F.2d at 402 ("[A]ny alleged failure to adopt adequate policies for inmate protection must amount to a breach of [defendant's] duty and must evidence reckless disregard or deliberate indifference to [plaintiff's] constitutional rights.").

Second, and equally compelling, there were *two* raids in this case during which allegedly unconstitutional conduct occurred. Sheriff Morgan bases his claim to qualified immunity on his lack of personal involvement in and his lack of knowledge as to the details regarding the conduct of both raids. Citing this Court's opinion in *Hardin v. Hayes*, 957 F.2d 845 (11th Cir.1992), Sheriff Morgan urges us to focus on the information he possessed at the time he authorized the raids. We do so, but we cannot ignore the stark factual distinction between *Hardin* and the present case: In *Hardin* there was one suicide; in this case there were two raids. Indeed, at oral argument, Sheriff Morgan's counsel conceded that after the first raid, Sheriff Morgan was debriefed on how the raid had been conducted. Counsel further acknowledged that what happened at the second raid was materially identical to the events of the first raid. Thus, even if Sheriff Morgan had a reasonable basis for believing that his policies and training were adequate going into the first raid, that fails to explain why he authorized exactly the same conduct three months later in March of 1991, when he had reason to know better.

Similarly, even if Chief Morgan and Officer Dendinger had not been fully aware of the Task Force's plan of attack before the first raid, as participants in the first

raid they had ample opportunity to determine before the second raid was conducted whether the first had comported with constitutional requirements. Upon learning of the manner in which the first raid was conducted, reasonable law enforcement officials would have been on notice that clearly established Fourth Amendment rights had been violated. Willingness to engage in the second raid demonstrated deliberate indifference to those rights, and it reflected accession to and adoption of the policies and procedures employed.

We hold that the law was clearly established in December of 1990 and March of 1991 that the Fourth Amendment proscribed the alleged conduct that law enforcement officials, including the individual defendants, engaged in in connection with the raids on the Club. Finding that the plaintiffs have, at a minimum, raised a genuine issue of material fact as to whether these defendants engaged in such conduct, we conclude that the district court properly denied the defendants' motions for summary judgment on qualified immunity grounds as to the Fourth Amendment claims.

b. The Equal Protection Clause Claims

The district court also held that " 'the equal protection right to be free from intentional racial discrimination' was clearly established," and found "sufficient evidence [adduced by plaintiffs] to create a genuine issue of material fact as to whether the raids may have been racially motivated." The court specifically pointed to: the statement of Officer Dendinger to Mattie Staples regarding the intention to close the Club down because of the

race of the owners and patrons; Sheriff Morgan's deposition testimony that the black-owned Club was the only one raided in his twenty-one years as sheriff; and evidence of a higher incidence of DUI offenses for blacks than whites in the vicinity of the Club. The court acknowledged that this evidence had "mixed implications," but held that it was sufficient to raise triable issues of fact.

Defendants do not challenge the district court's holding that at the time of the raids the right to be protected from intentional racial discrimination in law enforcement was clearly established. Instead, they argue that summary judgment should have been granted because there was no genuine issue of material fact that they engaged in such discrimination. Based on our review of the record, we agree with the district court that a genuine issue of material fact does exist about whether the defendants engaged in intentional racial discrimination in authorizing or participating in the raids. The district court properly denied the summary judgment motions as to the equal protection claims.

c. The Due Process Clause Claims

The district court denied the individual defendants' qualified immunity motions as to the due process claims. We conclude that it erred in doing so.

To the extent that the due process claims are concerned with the use of excessive force, *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) forecloses any contention that the law was clearly established

in 1990 and 1991 that use of excessive force violated the Due Process Clause. In *Graham*, the Supreme Court held:

> *all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach.

Id. at 395, 109 S.Ct. at 1871 (emphasis in original). This Court has recently joined the First, Sixth and Ninth Circuits in purporting to narrow the scope of *Graham*, by holding "that a non-seizure Fourteenth Amendment substantive due process claim of excessive force survives *Graham*." *Wilson v. Northcutt*, 987 F.2d 719, 722 (11th Cir.1993). However, our 1993 decision in *Wilson* came two years too late to establish the law at the time of the two raids in this case. At the time of these raids, the law was not clearly established that excessive force in connection with a search violated not only the Fourth Amendment but also the Due Process Clause.

The complaint suggests that plaintiffs also contend that due process liberty and property rights were violated by a deliberate attempt of the defendants to drive the Club out of business through pretextual law enforcement raids. Plaintiffs rely on a substantially analogous case in which the Ninth Circuit upheld a jury verdict on a § 1983 action based, in part, on an alleged due process violation. *Benigni v. City of Hemet*, 879 F.2d 473 (9th Cir.1988). In *Benigni*, the plaintiff owned a restaurant and bar and claimed that constant police harassment of his business and customers forced him to sell the business at a loss.

The Ninth Circuit found that "[t]he due process clause protects a liberty or property interest in pursuing the 'common occupations or professions of life.' " *Id.* at 478 (quoting *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39, 77 S.Ct. 752, 755-56, 1 L.Ed.2d 796 (1957) ("A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.")).

Under qualified immunity analysis, the question is whether it was *clearly established* at the time of the raids that the Due Process Clause proscribed attempts by law enforcement to force citizens out of business through the use of repeated and improperly motivated raids of their business establishments. It may have been in the Ninth Circuit by virtue of the *Benigni* decision, but the courts of appeals generally and this Circuit in particular have not addressed the specific question involved. Plaintiffs' counsel conceded as much at oral argument when he stated that he had located no authority that clearly established on these facts a due process right that is separate and distinct from an equal protection right. Because such a due process right was not clearly established at the time of the raids in this case, Sheriff Morgan, Chief Morgan and Officer Dendinger are entitled to qualified immunity on the due process claims. Qualified immunity applies to monetary damages relief, but not to declaratory and injunctive relief. *Fortner v. Thomas*, 983 F.2d 1024, 1029 (11th Cir.1993). Therefore, the summary judgment motions of the three individual defendants should have been granted as to the due process claims to the extent plaintiffs seek monetary damages.

3. *Summary*

We hold that the individual defendants in this case have established the defense of qualified immunity as to plaintiffs' due process claims, but not as to the Fourth Amendment and equal protection claims. Accordingly, their summary judgment motions were properly denied, except as to the due process claims. Judgment should have been entered for the defendants on the monetary damages part of the due process claims.

B. THE COUNTY COMMISSION'S APPEAL

1. *The Jurisdiction Issue*

The denial of a motion for summary judgment generally is not a final judgment for purposes of appellate jurisdiction. However, an exception exists where the summary judgment motion is based on a claim of qualified immunity "to the extent that [the denial] turns on an issue of law. . . . " *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985); *see also McDaniel v. Woodard*, 886 F.2d 311, 313 (11th Cir.1989). That is why we reviewed the order denying the summary judgment motions of the individual defendants; those motions were based on the qualified immunity doctrine. Of course the mere fact that a district court's order includes a denial of qualified immunity does not mean that all issues addressed in that order are immediately appealable. To be appealable the parts of a summary judgment order addressing other issues must either independently meet the requirements of the *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93

L.Ed. 1528 (1949), test; or, we must be persuaded to exercise our discretionary pendent appellate jurisdiction over them. Because the County Commission's summary judgment motion was not based upon the qualified immunity doctrine, the exception that permits interlocutory appeals of qualified immunity issues is inapplicable. Instead, the County Commission argues the *Cohen* collateral order doctrine and, alternatively, seeks to invoke our discretionary pendent appellate jurisdiction power.

a. The *Cohen* Test

To satisfy *Cohen*, an order must: (i) "conclusively determine the disputed question," (ii) "resolve an important issue completely separate from the merits of the action," and (iii) "be effectively unreviewable on appeal from a final judgment." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431, 105 S.Ct. 2757, 2761, 86 L.Ed.2d 340 (1985). Applying this test to the present case, it is readily apparent that the *Cohen* standard is not met because, for one thing, the question of whether the County may be held liable for the Sheriff's law enforcement actions is reviewable on appeal from a final judgment. In reaching this conclusion, we reject the County Commission's attempt to recast the third component of the *Cohen* test as an inquiry into whether the Commission's " 'right' to forego litigation" has been denied. Such a formulation would effectively eviscerate the *Cohen* test, because many of the erroneous legal rulings of a district court would constitute a denial of a party's "right" to forego litigation, thereby entitling that party to take an interlocutory

appeal. The *Cohen* Court could not have intended such a result.

b. Pendent Appellate Jurisdiction

While the doctrine of pendent appellate jurisdiction has received mixed reviews in the courts of appeals, we have given it our blessing in several cases including *Schmelz v. Monroe County*, 954 F.2d 1540, 1542-43 (11th Cir.1992), and *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d at 1508-09.[3] In considering the question of pendent jurisdiction over an Eleventh Amendment immunity defense, the *Stewart* court found that "[p]endent jurisdiction is properly exercised over nonappealable decisions of the district court when the reviewing court already has jurisdiction over one issue in the case." *Stewart*, 908 F.2d at 1509 (citing 9 *Moore's Federal Practice* ¶ 110.25 ("[O]nce a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done.")); *see also Schmetz*, 954 F.2d at 1543 (pendent appellate jurisdiction "is based on concerns for judicial economy"); *but see Natale v. Town of Ridgefield*, 927 F.2d 101, 104 (2d Cir.1991) ("Only in exceptional circumstances should litigants, over

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[3] *See also Akin v. PAFEC Ltd.*, 991 F.2d 1550, 1563-64 (11th Cir.1993); *Andrews v. Employees' Retirement Plan*, 938 F.2d 1245, 1247-48 (11th Cir.1991); *Crymes v. DeKalb County*, 923 F.2d 1482, 1485 (11th Cir.1991); *Broughton v. Courtney*, 861 F.2d 639, 641 n.1 (11th Cir.1988); *Western Electric Co. v. Milgo Electronic Corp.*, 568 F.2d 1203, 1208 (5th Cir.), *cert. denied*, 439 U.S. 895, 99 S.Ct. 255, 58 L.Ed.2d 241 (1978); *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 847 (5th Cir.), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977).

whom this Court cannot ordinarily exercise jurisdiction, be permitted to ride on the jurisdictional coattails of another party."). We have stated repeatedly that whether to exercise pendent appellate jurisdiction is discretionary. *See, e.g., Akin v. PAFEC Ltd.*, 991 F.2d 1550, 1563-64 (11th Cir.1993) (declining to exercise discretion under the pendent appellate jurisdiction doctrine to consider objections to the district court's ruling on plaintiff's untimely jury demand); *Crymes v. DeKalb County*, 923 F.2d 1482, 1485 & n. 4 (11th Cir.1991) (declining to "delineat[e] . . . the scope of our discretion to exercise jurisdiction over issues pendent to an interlocutory appeal from a denial of absolute immunity"). For reasons of judicial economy, we choose to exercise our pendent jurisdiction in this instance as we did in the *Stewart* and *Schmelz* cases. If the County Commission is correct about the merits in its appeal, reviewing the district court's order would put an end to the entire case against the County, because there are no pendent state law claims against it.

2. *The Merits of the County Commission's Appeal*

The County Commission correctly notes that § 1983 liability may not be grounded in a theory of *respondeat superior*, The Supreme Court so held in *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). A city or county government may be subjected to § 1983 liability, however, for the acts of an official who "possesses final authority to establish municipal policy with respect to the action ordered." *Pembaur v. Cincinnati*, 475 U.S. 469, 481, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986). A county may be liable under

§ 1983 just as a city may be. *See, e.g., Parker v. Williams*, 862 F.2d 1471, 1477 (11th Cir.1989).

This Court has found it "well established that a municipality may be held liable under § 1983 only when the deprivation at issue was undertaken pursuant to [municipal] 'custom' or 'policy.' " *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1479 (11th Cir. 1991). The *Brown* Court further noted that the policy or custom need not have been put in place by the municipality's legislative body. Rather, "a municipal official who has 'final policymaking authority' in a certain area of the city's business may by his or her action subject the government to § 1983 liability when the challenged action falls within that authority." *Id.* at 1480 (citing *St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S.Ct. 915, 923, 99 L.Ed.2d 107 (1988) and *Pembaur*, 475 U.S. at 481, 106 S.Ct. at 1299); *see also Mandel v. Doe*, 888 F.2d 783, 792-93 (11th Cir.1989). "Whether a particular official has final policymaking authority is a question of state law." *Brown*, 923 F.2d at 1480 (citing *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737, 109 S.Ct. 2702, 2723, 105 L.Ed.2d 598 (1989)).

The Alabama Supreme Court has held that "[a] sheriff is not an employee of a county for purposes of imposing liability on the county under a theory of respondeat superior." *Parker v. Amerson*, 519 So.2d 442, 442 (Ala.1987). As the Alabama Court observed, the decision of the Alabama Constitutional Convention of 1901 to make county sheriffs executive officers of the state was a response to "[t]he failure of county courts to punish sheriffs for neglect of duty and sheriffs' acquiescence in mob violence and ruthless vigilantism." *Id.* at 443. This Court, however, found in *Parker v. Williams*, 862 F.2d 1471

(11th Cir.1989), that the fact that an Alabama sheriff "works" for the state does not answer the question of whose policy he implements when he takes action. 862 F.2d at 1478. As *Parker* teaches, "[t]he pivotal point is whether [Sheriff Morgan] was exercising county power with final authority" when he authorized the law enforcement raids in this case. *Id.*

In *Parker*, liability was imposed on the county by virtue of the sheriff's hiring decisions relating to the county jail. This Court found that based on Alabama statutes, "Alabama counties and their sheriffs maintain their county jails in partnership". *Id.* at 1478-79. The Commission argues that there is no such law enforcement partnership between Alabama counties and their sheriffs. It points out that under Alabama law, it is:

> the duty of sheriffs in their respective counties, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes in their counties and to present a report of the evidence so secured to the district attorney or assistant district attorney for the county.

Ala. Code § 36-22-3(4) (1991). The Commission contends that no similar law enforcement duty or authority has been bestowed upon the County itself. We agree. Plaintiffs have not cited us to any statutes or decisions indicating that Alabama counties, and their governing commissions, have law enforcement authority or duties. Because Alabama counties are "authorized to do only those things permitted or directed by the legislature of Alabama," *Lockridge v. Etowah County Comm'n*, 460 So.2d 1361, 1363 (Ala. Civ.App.1984), and because the State has

not assigned the counties any law enforcement authority, the sheriff is not exercising county power when he authorizes a raid on suspected criminal activity within his county. At least three federal district court Judges sitting in Alabama that have addressed this issue have reached the same conclusion; *Forehand v. Roberts*, No. CV-92-A-601-N, slip-op, at 2-3 (M.D.Ala. Aug. 11, 1992) (Albritton, J.); *Smith v. Arndt*, No. CV-92-H-1227-NE, slip op. at 2-3 (N.D.Ala. July 14, 1992) (Hancock, J.); and *Sanders v. Miller*, No. CV-91-N-2804-NE, slip op. at 4-7 (N.D.Ala. Apr. 13, 1992) (Nelson, J.). Each of those district courts found that unlike the jail function identified in *Parker v. Williams*, there is no law enforcement "partnersip" between Alabama counties and their sheriffs. We hold that Sheriff Morgan is not the final repository of Chambers County's general law enforcement authority, because it has none. Therefore, the County Commission is not liable for the Sheriff's law enforcement actions under 42 U.S.C. § 1983, and it is entitled to summary judgment on the § 1983 claims.

Our holding that Sheriff Morgan is not the final law enforcement decisionmaker for Chambers County also compels us to conclude that the Commission cannot be held liable under 42 U.S.C. § 1985(3), either. The elements of a cause of action under § 1985(3) are well established: a conspiracy for the purpose of denying any person or class of persons equal protection; an act in furtherance of the conspiracy; and an injury to a person, his property, or the deprivation of any right or privilege belonging to citizens of the United States. *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 793-94 (11th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1814, 123 L.Ed.2d 445 (1993).

We have previously observed that "[t]he language of Section 1985 which requires an intent to deprive one of equal protection or equal privileges and immunities means that there must be some racial or otherwise class-based invidiously discriminatory animus behind the conspirators' action." *Byrd v. Clark*, 783 F.2d 1002, 1007-08 (11th Cir.1986). As with § 1983, the theory of *respondeat superior* will not support liability under § 1985(3). *Owens v. Haas*, 601 F.2d 1242, 1247 (2nd Cir.), *cert. denied*, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979). Instead, a plaintiff must allege and prove each defendant's participation in the conspiracy, or a policy or custom of a municipal defendant that is causally related to the conspiracy. *See, e.g., Arnold v. Board of Educ. of Escambia County*, 880 F.2d 305, 318 (11th Cir.1989) (plaintiff failed to "allege any school board act from which the school board's participation in the conspiracy may be inferred").

Plaintiffs in the present case have shown no facts to establish the County Commission's involvement in a § 1985(3) conspiracy. There is no evidence in the record which links the Commission or any of its members to the alleged civil rights violations. Because the law enforcement actions and policies of Sheriff Morgan cannot be imputed to the County Commission, there exists no genuine issue of material fact about the Commission's involvement in a conspiracy to deprive the plaintiffs of their civil rights. It had no such involvement. We hold, therefore, that the Commission is also entitled to summary judgment on the § 1985(3) claims.

C. THE CITY'S APPEAL

1. *The Federal Claims*

The City seeks review of the denial of its summary judgment motion on the federal civil rights claims. The City's argument parallels the County Commission's: Chief Morgan was not the final decisionmaker for City law enforcement authority because the "City defendants had no authority" over the conduct of the two raids. The focus, however, is not on whether Chief Morgan exercised authority over the conduct of the raid, but rather on whether his participation in the raids, by virtue of his position and authority within the City, put the City's imprimatur on the unconstitutional conduct.

The district court did not expressly decide the issue of whether Chief Morgan exercised final policymaking authority in the law enforcement area for the City. The court noted only that the City could "be held liable on Counts I and II . . . for Chief Morgan's decision to participate in the allegedly illegal raids of the Capri Club under Section 1983 *if* Chief Morgan is the final policy-maker for the City in the area of law enforcement" (emphasis added). However, the court declined to grant the City summary judgment "without some assertion that the plaintiffs cannot prove that Chief Morgan was the final policy-maker in this area."

The City's appeal of the district court's action does not meet the requirements of the *Cohen* collateral order test, because the order does not conclusively determine the disputed question, and the issue is not unreviewable after final judgment. We also decline to exercise our discretionary pendent appellate jurisdiction, because of

the state of the record on the issue. Relying on the Supreme Court's decisions in *Jett v. Dallas Indep. School Dist.* 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989), *St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), and *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), we have previously explained the process required to assess a claim of municipal liability based on a municipal official allegedly acting as a final policymaker:

> Under the theory of municipal liability, the first step of the inquiry is to identify those individuals whose decisions represent the official policy of the local governmental unit. As already discussed, this is a question of law to be resolved by the trial court judge. In making this determination, the court should examine not only the relevant positive law, including ordinances, rules and regulations, *but also the relevant customs and practices having the force of law.*

Mandel v. Doe, 888 F.2d 783, 793 (11th Cir. 1989) (citations omitted) (emphasis added). In this case, there is no evidence in the record concerning "the relevant customs and practices having the force of law" which would define the distribution of law enforcement authority between the City and Chief Morgan. Indeed, the district court noted that the parties had not even briefed this issue before it. In light of this significant gap in the record, we will not exercise pendent appellate jurisdiction over the City's appeal.

2. *The Pendent State Law Claims*

In the aftermath of the district court's orders, the status of the state law claims is as follows:

1. Against Chambers County Commission: no surviving state law claims.

2. Against Sheriff Morgan: no surviving state law claims.

3. Against the City of Wadley: Count III (assault only) and Count IV (negligence) relating to the March, 1991 raid are the only surviving state law claims.

4. Against Chief Morgan: Count III (assault and false imprisonment) and Count IV (negligence) are surviving state law claims.

5. Against Officer Dendinger: Count III (assault and false imprisonment) is the only surviving state law claim.

The City, joined by Chief Morgan and Officer Dendinger, urge this Court to exercise pendent jurisdiction over the district court's denial of summary judgment on these state law claims. We decline to do so. Each of the three defendants against whom state claims survive must proceed to trial on the federal claims anyway. This trial will necessarily include presentation of evidence bearing directly on the state as well as the federal claims. Therefore, judicial economy concerns are not sufficiently implicated to justify use of pendent appellate jurisdiction. In reaching this conclusion, of course, we intimate no view as to the merits of these claims.

III. CONCLUSION

As to the district court's order denying the qualified immunity summary judgment motions of Sheriff Morgan, Chief Morgan, and Officer Dendinger: we AFFIRM that denial insofar as the Fourth Amendment and equal protection claims are concerned; and, we REVERSE that denial insofar as the due process claims for monetary damages are concerned.

We REVERSE the district court's denial of the Chambers County Commission's motion for summary judgment. We hold that because the actions and policies of Sheriff Morgan cannot be imputed to the County Commission, and because the plaintiffs have failed to offer evidence to establish the involvement of the Commission or any of its members in the alleged violations, the Commission is entitled to summary judgment on all the federal claims. Therefore, summary judgment in favor of the County Commission on Counts I and II of the complaint is due to be granted.

We decline to exercise jurisdiction over the City's appeal of the district court's denial of the City's motion for summary judgment. Our decision here is not meant to foreclose further development of the facts and consideration by the district court of whether Chief Morgan was the final law enforcement decisionmaker for the City at the time of the raids.

We also decline to exercise jurisdiction over the appeals of the City, Chief Morgan, and Officer Dendinger concerning the district court's denial of summary judgment to those defendants on the pendent state law claims.

Accordingly, we AFFIRM in part, REVERSE in part, and REMAND this case for further proceedings consistent with this opinion.

Tom SWINT; Tony Spradley; Drecilla James and Jerome Lewis, Plaintiffs-Appellees,

v.

The CITY OF WADLEY, ALABAMA; Freddie Morgan and Gregory Dendinger in their official and individual capacities; Chambers County Commission, Defendants-Appellants.

Chambers County Sheriff's Department, Defendant,

James C. Morgan, in his official and individual capacity, Defendant-Appellant.

No. 92-6574.

United States Court of Appeals, Eleventh Circuit.

Jan. 18, 1994.

Appeal from the United States District Court for the Middle District of Alabama.

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 11/3/93, 11th Cir., 5 F.3d 1435).

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge, and BRIGHT*, Senior Circuit Judge.

PER CURIAM:

Upon consideration of Defendant-Appellant James C. Morgan's suggestion for rehearing en banc, the Court

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* Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

orders that its opinion be modified in the following three respects:

(1) The first sentence of the second paragraph of the opinion (which is the first sentence of the first full paragraph on 5 F.3d at 1439) is deleted, and in its place are inserted the following two sentences:

> We affirm the district court's denial of the individual defendants' qualified immunity summary judgment motions insofar as the Fourth Amendment is concerned, and we also affirm the denial of summary judgment on qualified immunity grounds insofar as the equal protection claims against Officer Dendinger and Chief Morgan are concerned. We reverse the denial of summary judgment to Sheriff Morgan on the equal protection claims, and we reverse the denial of summary judgment on qualified immunity grounds to all three individual defendants on the due process claims.

(2) The second paragraph of section II. A.2.b (under the heading "The Equal Protection Clause Claims") on 5 F.3d at 1447 (which is also the first full paragraph in the second column on 5 F.3d at 1447) is deleted, and inserted in its place are the following two paragraphs:

> Defendants do not challenge the district court's holding that at the time of the raids the right to be protected from intentional racial discrimination in law enforcement was clearly established. Instead, they argue that summary judgment should have been granted because there was no genuine issue of material fact that they engaged in such discrimination. Based on our review of the record, we agree with the district court that a genuine issue of material

> fact does exist about whether Officer Dendinger and Chief Morgan engaged in intentional racial discrimination in authorizing or participating in the raids. Mattie Staples' testimony about Officer Dondinger's [sic] alleged statement to her suffices to create a genuine issue of material fact on that issue as to Officer Dendinger and his police chief, Freddie Morgan. The district court properly denied the summary judgment motions as to the equal protection claims insofar as those two defendants are concerned.
>
> Sheriff Morgan, however, is a different matter. Neither he, nor any of his deputies, made any statement that he or his department intended to close the Club down because of the race of the owners and patrons. The fact that this club is the only one Sheriff Morgan authorized to be raided in his twenty-one years as sheriff does not prove that he was motivated by racial considerations. The first club raided had to be either black-owned or white-owned, and that it was one instead of the other proves nothing. Likewise, it is hardly surprising that there would be a higher incidence of DUI arrests for blacks than whites in the vicinity of a club that sells alcoholic beverages to a black clientele. Absent some evidence of racially disproportionate arrests compared to the actual incidence of violations by race, there is no basis for inferring racially selective law enforcement. Because there is no evidence that Sheriff Morgan's actions in authorizing the raids on the Club were motivated by intentional racial discrimination, there is no genuine issue of material fact insofar as the equal protection claims relate to him, and the district court erred in denying his summary judgment motion on those claims.

(3) The one paragraph of Section II.A.3 (under the heading "Summary") on 5 F.3d at 1448 is deleted, and in its place the following paragraph is inserted:

> We hold that the individual defendants in this case have established the defense of qualified immunity as to plaintiff's due process claims, but not as to the Fourth Amendment claims. We further hold that Officer Dendinger and Chief Morgan did not establish their entitlement to summary judgment on the equal protection claims, but Sheriff Morgan did. Accordingly, the individual defendants' summary judgment motions, were properly denied except as to the due process claims, and except as the equal protection claims concerned Sheriff Morgan. Judgment should have been entered for all of the individual defendants on the monetary part of the due process claims, and judgment should have been entered for Sheriff Morgan on all aspects of the equal protection claims.

No judge in regular active service on the court, having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the suggestion for rehearing en banc is DENIED.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

TOM SWINT; ET AL, Plaintiffs, VS. THE CITY OF WADLEY, ALABAMA; ET AL, Defendants.	)	CIVIL ACTION NO. 91V-965-E

OPINION

(Filed June 2, 1992)

This cause is now before the Court on Defendants' Motions for Summary Judgment filed herein December 18, 1991, and January 27, 1992, and on the materials and briefs submitted in support of and in opposition thereto. This Court has jurisdiction of this cause pursuant to 28 U.S.C. §§ 1331, 1343, and 1367.

This case arises from two raids conducted by law enforcement officers in December, 1990, and in March 1991, of the Capri Club, a night club located in Chambers county, Alabama, and owned and operated by Plaintiffs Tom Swint and Tony Spradley. At the time of the raids, Plaintiff Drecilla James was the manager of the club, and Plaintiff Jerome Lewis was a patron of the club.

During the two raids, officers allegedly entered the club with their guns drawn and kept these guns pointed at those present while they searched the premises and also searched, threatened, and questioned patrons. Some of the officers wore ski masks and were dressed in black.

The Plaintiffs contend that the raids were racially motivated and were not supported by either an arrest warrant or a search warrant. All of the Plaintiffs are black.

In their four-count complaint, the Plaintiffs allege violations of their constitutional rights under 42 U.S.C. §§ 1983 and 1985 in Counts I and II;[1] allege a pendent State law claim for assault and false imprisonment in Count III; and allege a pendent State law claim for negligence in hiring, training, and supervising employees in Count IV. After this Court's ruling of January 22, 1992, on motions to dismiss, the remaining Defendants include the City of Wadley, the Chambers County Commission, Freddie Morgan, Gregory Dendinger, and James Morgan.[2]

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[1] The Plaintiffs allege violations of the Fourth, Fifth, Sixth, Thirteenth and Fourteenth Amendments. (Complaint ¶ 26). In Count I, they allege a violation of the Fourth Amendment right to be free from unreasonable searches or detentions; of the Sixth Amendment right to be informed of the accusation against them; of the Fifth and Fourteenth Amendments "not to be deprived of liberty or property without due process of law"; and the Fourteenth Amendment right to equal protection. (Complaint, Count I). In Count II they allege a conspiracy to deprive them of their rights "of free association and freedom of movement and speech," of due process of law, of equal protection, and of "the right to be free of racially discriminatory conduct." (Complaint, Count II).

[2] The Plaintiffs also alleged violations under 42 U.S.C. § 1981, but all claims under this section were dismissed by this Court's Order of January 22, 1992. Also dismissed in that Order were Defendant Chambers County Sheriff's Department; Counts I and II as to Defendant James C. Morgan to the extent that he is sued in his official capacity for damages; Count IV as to Defendant James C. Morgan; and Counts III and IV as to Defendant City of Wadley to the extent of the alleged December, 1990 raid. The Court also struck from the Complaint the

Undisputed facts.[3] On December 14, 1990, and on March 29, 1991, law enforcement officers from the City of Wadley, Alabama, and from various Alabama counties, including Chambers County, raided the Capri Club in Chambers County as part of a joint narcotics operations conducted by the Chambers County Drug Task Force. (County's Ex. A, Birchfield Affidavit; County's Ex. D, James Morgan Affidavit; P Ex. D to County's Motion, Lewis Deposition, at 48). These raids were conducted without a search warrant or an arrest warrant. (County's Ex. A. Birchfield Affidavit; Freddie Morgan Deposition, at 48).

The Task Force's plan for each raid was for an undercover officer to go into the club and to attempt to buy from a suspected drug dealer. (County's Ex. A, Birchfield affidavit, ¶ 11) If the officer was able to make a buy, he would alert the Task Force after he left the club. Id., at ¶¶ 13, 23-24; Freddie Morgan deposition, at 69-70. The first team of officers would then enter the club to control the crowd. (County's Ex. A, Birchfield affidavit, ¶¶ 14, 24; Freddie Morgan deposition, at 55,64). This first team, a SWAT team from Lanett, Alabama, was dressed in black, wore ski masks, and carried shotguns. (County's Ex. A, Birchfield affidavit, ¶¶ 14, 24). Within 30 seconds or so of

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punitive damages demand against the Municipal Defendants City of Wadley and Chambers County Commission.

[3] Unless otherwise noted, all references to exhibits of the Chambers County Defendants will be designated "County's Ex."; all references to exhibits of the City Defendants will be designated "City's Ex."; and all references to Plaintiffs' exhibits will be designated either "P Ex. to County's Motion" or "P Ex. to City's Motion".

their entry, other officers would enter. (County's Ex. A, Birchfield affidavit, ¶¶ 17, 24; Freddie Morgan deposition, at 65). Freddie Morgan, the Chief of Police of the City of Wadley, who participated in the operation, described the plan: Investigator Birchfield would wait outside the club for a signal from the undercover officer that a buy had been made, and then "he would tell everybody else, you know, to come on, and they would take the – the sellers from the club." (Freddie Morgan deposition, at 54-55).

When this plan was executed at the first raid in December, 1990, an undercover agent purchased marijuana and crack cocaine from suspect Tony Battle. (County's Ex. A, Birchfield affidavit, ¶ 13). Mr. Battle was arrested that night.[4] Some 30 to 40 officers participated in the operation. (County's Ex. A, Birchfield affidavit, ¶ 17). Although the undercover agent at the second raid in

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[4] A factual dispute exists as to whether Tony Battle was arrested inside the club or outside the club on December 14, 1990. According to Investigator Birchfield's affidavit, after the SWAT team entered the club, the undercover agent went back inside and identified Tony Battle as the person who sold him the marijuana and cocaine. (County's Ex. A, Birchfield affidavit, ¶ 17). Plaintiff Spradley disputes that Tony Battle was in the club on the night of December 14, 1990. (P Ex. B to County's Motion, Spradley deposition, at 305-08). Moreover, investigator Birchfield attests that Battle's younger brother, a minor, was arrested for having some of the marked money the undercover agent gave Battle when he made the buy. (County's Ex. A, Birchfield affidavit, ¶ 17). According to Plaintiff Spradley, the officers seized the marked bills from the club's door receipts box, which box was used for collecting an admissions charge as patrons entered the club that night. (P Ex. B to County's Motion, Spradley deposition, at 311-13).

March, 1991, was also able to purchase crack cocaine, no arrests occurred because the agent was unable to identify the person who sold him the cocaine. (County's Ex. A, Birchfield Affidavit, ¶ 24).

Investigator Timothy Birchfield of the Chambers County Sheriff's Department obtained approval for conducting the two raids from Defendant James Morgan, Sheriff of Chambers County (hereafter Sheriff Morgan). (County's Ex. A, Birchfield affidavit; County's Ex. D, James Morgan Affidavit). Although Sheriff Morgan approved the raids, he did not personally participate in them. (County's Ex. D, James Morgan Affidavit; James Morgan deposition, 12-13; 37-39). He deputized officers from other counties so that they could participate. (James Morgan deposition, pp. 13-15) He knew that the two raids occurred "because of the suspected sales of illegal narcotics inside the Club Capri and the actual purchase of such drugs by undercover officers prior to each raid." (County's Ex. D, James Morgan affidavit, ¶ 10). "With regards to drug operations," his policy was:

> "to raid an establishment only if accompanied by a search warrant or with probable cause. If an informant or other reliable information leads us to believe that illegal drug activities are taking place in an establishment, an undercover officer is usually sent in to attempt to make a drug buy. It is common practice that if a drug buy takes place, a drug raid may take place to arrest those responsible." (County's Ex. D, Morgan Affidavit, ¶ 4).

Investigator Birchfield also understood the Sheriff's policy to be that his officers not "initiate any narcotics raid

on a business establishment or home unless there is either a search warrant or a drug buy." (County's Ex. A, Birchfield Affidavit, ¶ 26.

Defendants Freddie Morgan, the Chief of Police of the City of Wadley (hereafter Chief Morgan), and Gregory Dendinger, a police officer with the City of Wadley personally participated in the two raids. (Freddie Morgan deposition, at 56). Chief Morgan testified that the "entry team" carried shotguns on both occasions. (Freddie Morgan Deposition, p. 75). During the second raid, he observed "a certain number of patrons who were . . . frisked and their money looked through." (Freddie Morgan Deposition, p. 77).

Chief Morgan also testified that about 30 days before the first raid, his department received information from a confidential informant that narcotics were being sold in the club. (Freddie Morgan Deposition, at 36-37). The suspected drug dealers did not include any of the Plaintiffs, the owners or employees of the club, or the Plaintiff patron, Jerome Lewis. Id., at 41, 42, 77-85.[5] Investigator

[5] During Chief Morgan's deposition, his attorney would not allow him to answer the Plaintiffs' question of whether Plaintiff Jerome Lewis, a patron of the Club, was suspected drug dealer at the time of the raids. (Freddie Morgan Deposition, at 77-85). At the pretrial conference on May 12, 1992, counsel for the Plaintiffs informed this Court that he had reserved that question, and this Court ordered the defense to answer the question. This Court will accept for purposes of summary judgment that Jerome Lewis was not a suspected drug dealer because the defense would not allow Chief Morgan to answer this question and has been unable to rely on any evidence in the record that contradicts Lewis' testimony that he never sold

Birchfield testified that, during 1990 and after the first raid, the Chambers County Sheriff's Department received numerous complaints from citizens who suspected that drugs were being sold in the club. (County's Ex. A, Birchfield affidavit, ¶ 9).[6] Sheriff Morgan testified that in the second operation, he received information from a reliable informant that drugs were being dealt at the Capri Club. (James Morgan deposition, pp. 37-39). Sheriff Morgan testified that he then told Investigator Birchfield to investigate and that if he decided that a "drug operation there" was in order, to go ahead with it. Id., at 37.

drugs or associated with anyone who did. (P Ex. D to County's Motion, Lewis deposition, at 53).

[6] The Plaintiffs note in their brief opposing the motion of the County Defendants that Sheriff Morgan was requested to bring to his deposition all records of any complaints received by his office concerning the Capri Club, but he produced none. (See Plaintiffs' brief opposing the County's Motion, p. 12; P Ex. A to County's Motion.) The Plaintiffs should have filed a motion to compel with this Court if they were experiencing discovery problems.

Investigator Birchfield also recalls that the decision to use a SWAT team was made because the Wadley Police Department had had difficulty controlling fights at the club and because ABC Agent Dennis Farr had been thrown out of the club when he attempted to check on compliance with the alcoholic beverage control laws. (County's Ex. A, Birchfield Affidavit, ¶ 16). The Plaintiffs dispute the fact that Agent Farr was thrown out of the club. (P Ex. B to County's Motion, Spradley Deposition, at 304-05). The Plaintiffs also note that the Wadley Police Department records, which Defendants City of Wadley, Freddie Morgan, and Gregory Dendinger have furnished in support of their Motion for Summary Judgment, cover periods that occurred after the first raid. (See Plaintiffs' "Supplemental Opposition to Defendants City of Wadley Motion for Summary Judgment," p. 1; City's Exs. A-D).

Plaintiffs Spradley and James were present during the December, 1990, raid. (P Ex. B to County's Motion, Spradley deposition, at 305; P Ex. C to County's Motion, James deposition, at 21). These Plaintiffs testified that the officers in ski masks rushed in without saying anything, that other officers soon followed, and that guns were pointed at the Plaintiffs, employees, and patrons. (P Ex. B to County's Motion, Spradley deposition, at 315, 317; P Ex. C to County's Motion, James deposition, at 21, 22). Plaintiff Spradley testified that he thought it was a robbery. (P Ex. B to County's Motion, Spradley deposition, at 318). He further testified that one officer told him that he would like to look through the cash register and the door receipts (Id., at 311); that he, Plaintiff Spradley, was given a receipt for marked bills removed from the door receipts box (Id., at 311); and that the officers told those in the Club not to move until the raid was over (Id., at 318).

Plaintiff James testified that when the officers came in, one jumped behind the counter where she was and told her to freeze (P Ex. C to County's Motion, James deposition, at 21-22); that this officer told her to get out from behind the bar; that the officers then started checking the liquor, and an officer in a brown Chambers County Sheriff's Department uniform went through the cash register and everything (Id., at 22-23); that she saw Chief Morgan and Officer Dendinger in the Club (Id., at 26); that Chief Morgan refused her request when she asked him if she could go to the bathroom (Id., at 27); and that Officer Dendinger told one man to shut up or he would shut him up (Id., at 30).

Plaintiffs Swint, James, and Lewis were present during the March, 1991, raid (County's Ex. B, Swint deposition, at 57; 75-76; County's Ex. C. James Deposition, at 33; P Ex. D to County's Motion, Lewis deposition, at 49). The accounts given by these Plaintiffs are similar to those of the first raid in March: the entry team's coming in unannounced, followed by the other teams, and guns being pointed at the Plaintiffs and others in the club. (County's Ex. B, Swint deposition, at 75, 76; P Ex. C to County's Motion, James deposition, at 39; P Ex. D to County's Motion, Lewis deposition, at 49). Plaintiff James testified that during this second raid an officer also came behind the bar and pointed a gun at her and another girl who was behind the bar with James (P Ex. C. to County's Motion, James deposition, at 39), and that the officers told people "to hit the floor." (Id., at 40; P Ex. D to County's Motion, Lewis deposition, at 49).

Plaintiff Lewis testified that when he refused "to hit the floor" as ordered, an officer ordered him to put his hands over his head (P Ex. D to County's Motion, Lewis deposition, at 50); that an unmasked officer walked around looking at him and then told the other officer: "He's the one. He's got what we want," and that this officer then told him, "Come on out the door, boy" (Id., at 50-51); that he was then taken outside at gunpoint (Id., at 49-55);[7] that one of the officers wore a Chambers County

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[7] Investigator Birchfield attests that he "did not see any officer abuse any patrons of the Club nor point a gun in anyone's face." (County's Ex. A, Birchfield affidavit, ¶ 27). Chief Morgan attests that his officers "made no search [and] pointed no guns at anyone" and that he "saw no one search the club [and] saw no officers assault anyone." (City's Ex., Freddie Morgan affidavit).

Sheriff's Department jacket (Id., at 79-80); and that once outside, he was shoved against the wall, and the officers searched through his pockets and his wallet (Id., at 50-53; 80-81; 83).

Each raid lasted about 1-1/2 to 2 hours. (P Ex. B to County's Motion, Spradley deposition, at 318; P Ex. P Ex. C to County's Motion, James deposition, at 21; P Ex. D to County's Motion, Lewis deposition, at 63-64). Sheriff Morgan admitted in his deposition that, to his knowledge, the raids of the Capri Club were the only raids of a night club in Chambers County that had occurred there during his twenty-one years as Sheriff. (James Morgan deposition, at 44-45).[8] According to an affidavit signed by a Mattie Staples, Defendant Dendinger commented to her about two months after the last raid that "he was going to stop people from coming to Club Capri, . . . that the white people did not cause any trouble and he was going to straighten the black people out." (P Ex. to City's Motion, Staples Affidavit).[9] Statistics furnished the Plaintiffs by the Wadley Police Department indicate that during the period of January 17, 1988, through April 20, 1991, a good many arrests of blacks for DUI occurred on Highway 22 where the Capri Club is located. (P Ex. E to County's Motion).

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[8] Both Sheriff Morgan and Investigator Birchfield deny that the raids were racially motivated. (County's Ex. A, Birchfield Affidavit, ¶ 25; County's Ex. D, James Morgan Affidavit, ¶ 10).

[9] Chief Freddie Morgan attests that race was not a motive for raiding the clubs. (City's Ex., Freddie Morgan affidavit of December 18, 1991).

Contentions of Chambers County Defendants: As to the federal claims, Defendant Chambers County Commission contends that it did not participate in the two raids, that no policy or custom can be attributed to it, that Sheriff Morgan is not the final policy-maker for the County, that the Plaintiffs have suffered no personal injury, and that Plaintiffs Swint and Spradley cannot show they suffered any business loss as a result of the raids. As to the State claims, Defendant Chambers County Commission contends that these claims are barred because the Plaintiffs failed to file a claim initially with the County, as required by State law. The Plaintiffs having conceded that these claims are barred, they will be dismissed as to this Defendant.

As to the federal claims Defendant Sheriff James Morgan contends that he is entitled to qualified immunity, and that he did not participate in the raids and cannot be held liable on a respondeat superior theory. As to the remaining State claim against Defendant Sheriff Morgan in Count III, he contends that he did not participate in the raids and that he is absolutely immune under the Eleventh Amendment.

Contentions of the City of Wadley Defendants: Defendants City of Wadley, Chief Freddie Morgan, and Officer Gregory Dendinger contend that they are entitled to summary judgment as a matter of law, that the warrantless arrests were legal, and that the motion is based on the Complaint, Answer, Motion to Dismiss, and on the affidavit of Chief Morgan. The motions to dismiss, which this Court denied in part on January 22, 1990, attack the sufficiency of the allegations, raise the defense of qualified immunity for the individual Defendants, and state

properly that the Municipal Defendant cannot be held liable under § 1983 on a respondeat superior theory.

Contentions of the Plaintiffs: The Plaintiffs' arguments are that each raid was wrongful at its inception, that the facts did not warrant the use of a SWAT team, and that the raids were racially motivated and in violation of clearly established law.

As to the Chambers County Defendants, the Plaintiffs counter that Sheriff Morgan acted as the final repository of county authority and could bind the County with his decision-making, and that Sheriff Morgan cannot insulate himself from Section 1983 by delegating his duties to others. The Plaintiffs also urge that Sheriff Morgan is not entitled to qualified immunity because his actions violated clearly established law under the First Amendment right to freedom of association, under the Fourth Amendment right to be free from unreasonable searches and seizures, under the Fifth Amendment right of due process, and under the Fourteenth Amendment right to equal protection under the law.

As to the City of Wadley Defendants, the Plaintiffs counter that none of the documents submitted with the motions of these Defendants support the actions taken by these officers. The Plaintiffs contend that the logs of the Wadley Police Department and the admission of Defendant Dendinger of his intention to close the Capri Club evidence that the Capri Club was signaled out for harassment.

Summary Judgment Standard. In considering a motion for summary judgment, this Court must refrain from deciding material factual issues but, rather, must

decide whether such factual issues exist and, if not, whether the party moving for summary judgment is entitled to judgment as a matter of law. See *Dominick v. Dixie National Life Ins. Co.*, 809 F.2d 1559 (11th Cir. 1987). Furthermore, all inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmovant. See *Tippens v. Celotex Corp.*, 805 F.2d 949 (11th Cir. 1986). "Rule 56(c) mandates the entry of summary judgment * * * against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); accord *Kramer v. Unitas*, 831 F.2d 994, 997 (11th Cir. 1987). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact" [emphasis in original]. *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a [reasonable] jury to return a verdict for that party * * * . If the evidence is merely colorable * * * or is not significantly probative, summary judgment may be granted." *Anderson*, supra, 477 U.S. at 249-50; accord *Brown v. City of Lewiston*, 848 F.2d 1534, 1537 (11th Cir. 1988).

INDIVIDUAL DEFENDANTS
SHERIFF MORGAN, CHIEF MORGAN,
and OFFICER DENDINGER

Federal Claims: These Defendants, who are also sued in their individual capacity, contend that they are entitled

to qualified immunity. Government officials, acting in good faith and "performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1981). Once a defendant shows that he was acting within the scope of his discretionary authority, then the plaintiff must show that he lacked good faith by demonstrating that the official's actions "violated clearly established constitutional law." *Rich v. Dollar*, 842 F.2d 1558, 1563 (11th Cir. 1988).

"[T]he right the official is alleged to have violated must have been 'clearly established' in a . . . particularized . . . sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [T]he very action in question [need not] previously [have] been held unlawful, . . . but . . . in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1986). Officials are not required to predict the law, yet they are required to apply clearly established law to the factual setting before them. See *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1504 (11th Cir. 1990) [citing *Anderson*, 483 U.S. at 641; *People of Three Mile Island v. Nuclear Regulatory Comm'rs.*, 747 F.2d 239, 244 (3d Cir. 1984)].

If the law was not clearly established at the time of the official's conduct, then he is entitled to qualified immunity if he was acting in good faith and if it was reasonable to believe he had a right to do so. *See Stewart*, 908 F.2d at 1503. Otherwise, the defendant is not entitled

to summary judgment on qualified immunity grounds. Id.

None of these officers are shown by uncontradicted evidence to be entitled to summary judgment on qualified immunity grounds for their participation in these raids. As to the Plaintiffs' equal protection claims in Counts I and II, in December, 1990, and in March, 1991, "the equal protection right to be free from intentional racial discrimination" was clearly established. See *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1478 (11th Cir. 1991) [citing *Washington v. Davis*, 426 U.S. 229, 239-41 (1976)]; see also *Wayte v. United States*, 470 U.S. 598, 608 (1984) ("selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints" and "the decision [to enforce the laws] may not be based upon an unjustifiable standard such as race"). Also as to the Plaintiffs' due process claims in these two counts, a reasonable officer would have known that deliberate indifference to any one of the Plaintiffs' due process rights would violate the Fifth and Fourteenth Amendments. *See Rivas v. Freeman*, 940 F.2d 1491, 1496 (11th Cir. 1991).

As to the Plaintiffs' Fourth Amendment claims in Count I, the law was also clearly established in December, 1990, and in March, 1991, that:

> "Only in the face of 'exigent circumstances,' where obtaining a warrant would greatly compromise important law enforcement objectives, does the warrant requirement yield. When exigent circumstances coexist with probable cause, the Fourth Amendment has been held to permit warrantless searches and seizures." *United States*

v. Pantoja-Soto, 739 F.2d 1520, 1523 (11th Cir. 1984), cert. den. 470 U.S. 1008 (1985).[10]

In December, 1990, and in March, 1991, the law was also clearly established that the protection of the Fourth Amendment extends not only to private residences, but also to business premises, see *Pantoja-Soto*, 739 F.2d at 1523; and that each person in the Capri Club "was clothed with constitutional protection against an unreasonable search or an unreasonable seizure." See *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). Their presence in the Club where illegal drug activity had likely occurred did not extinguish this protection. Id.

The undisputed facts are that Sheriff Morgan approved two raids of the Capri Club based on probable cause to make a warrantless arrest of a patron believed to be inside the club at the time an undercover agent purchased drugs from him. The undisputed facts are also that Chief Morgan and Officer Dendinger participated in these raids. Although Sheriff Morgan, Chief Morgan, and Investigator Birchfield have all attested that the raids were not based on race, the Plaintiffs have come forward with sufficient evidence to create a genuine issue of material fact as to whether the raids may have been racially motivated. The affidavit of Mattie Staples that Officer Dendinger made a comment to her after the second raid that indicated intentions to close the club because of the race of its owners and patrons remains undisputed. Also,

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[10] Exigent circumstances arise; they are not circumstances that become exigent after they are manufactured for the convenience of law enforcement officers. See *Pantoja-Soto*, 739 F.2d at 1524.

Plaintiff Spradley has attested that, "During one of the raids one of the officers promised they were coming back and that they would not stop until they closed the club." (P Ex. to City's Motion, Spradley affidavit, at 2).[11] The Plaintiffs have also come forward with evidence that the club was the only club to Sheriff Morgan's knowledge that had ever been raided in Chambers County during his twenty-one years there as Sheriff. The Plaintiffs have also furnished undisputed evidence that a good number of blacks, as opposed to whites, were arrested for DUI offenses during the period of 1988 and 1991 and that these arrests occurred near the Capri Club. This evidence, at this stage, has mixed implications because it may or may not be evidence of racial discrimination.

Having found that the law was clearly established in December, 1990, and in March, 1991, that a raid of a business establishment violates the Fourth Amendment unless based on probable cause and exigent circumstances and that selective enforcement of the laws based on race violates the Equal Protection Clause of the Fourteenth Amendment, the Court also finds that the Plaintiffs have come forward with sufficient evidence to create a genuine issue of material fact as to whether exigent circumstances existed for the actions taken by the drug task force and as to whether the raids were racially motivated. The Court finds further that the Plaintiffs have come forward with sufficient evidence to create a

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[11] This affidavit is attached to the "Plaintiffs' Supplemental Opposition to Defendants City of Wadley Motion for Summary Judgment," filed January 17, 1992.

genuine issue of material fact as to whether the Defendants conspired to deprive the Plaintiffs of equal protection of the laws because the Capri club was owned by blacks and frequented by black patrons.

The Plaintiffs also contend that the raids violated their right to association, speech and movement, yet the Court cannot agree that the Plaintiffs clearly had such a right. See *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *see also, Benigni v. City of Hemet*, 879 F.2d 473, 476-77 (9th Cir. 1988). Accordingly, this Court will grant a partial summary judgment insofar as the Plaintiffs may claim in Count II that their freedom of association, speech and movement were violated by the raids on the Club.

As to the Plaintiff's Sixth Amendment claim in Count I that they had a right to be informed of the accusation against them, this Court cannot agree that at this stage they clearly had such a right. *See McNeil v. Wisconsin*, 111 S.Ct. 2204, 2207 (1991) (Sixth Amendment rights do not attach until adversary proceedings have commenced). Accordingly, this Court will grant a partial summary judgment insofar as the Plaintiffs may claim in Count I that they had a right to be informed of accusations against them.[12]

Defendant Sheriff Morgan also contends that he cannot be held liable under Section 1983 on a respondeat superior theory. While this Court agrees that he cannot be

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[12] The only other Constitutional claim remaining in Count I appears to be that of the Thirteenth Amendment, which the Plaintiffs indicated during the pretrial conference they would not pursue. The Court therefore considers this claim not before it.

liable under this theory, he can be liable if the Plaintiffs establish that the Sheriff personally participated in the wrongful activity or establishes a causal connection between his conduct and the alleged deprivation. See *Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir. 1990), cert.den., 111 S.Ct. 2056 (1991). This causal connection can be established where the official's "custom or policy . . . resulted in deliberate indifference to constitutional rights." See *Rivas v. Freeman*, 940 F.2d 1491, 1495 (11th Cir. 1991) [citing *Zatler v. Wainwright*, 802 F.2d 397 (11th Cir. 1986)].

The Plaintiffs have come forward with sufficient evidence to show that a genuine issue of material fact exists as to whether the raids were causally connected to Sheriff Morgan's approval of the two raids and to his policy encouraging these raids. The evidence presented by the Plaintiffs and the affidavits of Sheriff Morgan and Investigator Birchfield show that the Sheriff's policy was to not initiate a narcotics raid on a business establishment without a search warrant or a drug buy. (County's Ex. A, Birchfield Affidavit, ¶ 26; County's Ex. D, Morgan Affidavit, ¶ 4; James Morgan deposition, at 13-15, 37-39). This policy of allowing a raid on a business establishment with a drug buy but no exigent circumstances is evidence of an insufficient basis for a raid, or a search, of a business establishment or a home. Certainly, a drug buy by a reputable confidential informant is insufficient to support a search absent some showing that it was impractical or impossible to obtain a search warrant or an arrest warrant. Accordingly, Defendant Sheriff Morgan's motion for summary judgment should be denied on the basis that

there is evidence of his policy to authorize a raid of an establishment solely on the basis of a drug buy.

State Claims: The state claim remaining against Sheriff Morgan is Count III, a claim of assault and false imprisonment. This Court denied the Sheriff's motion to dismiss this count on absolute immunity grounds in its January 22, 1992, order because the Plaintiffs had alleged that Sheriff Morgan was among those officers who invaded the Capri Club and who engaged in the allegedly illegal raids. (See ¶ 12 of Complaint). The undisputed facts are that he was not with the officers when they invaded the Capri Club, as alleged, and this Court agrees that he is entitled to absolute immunity. See *White v. Birchfield*, 582 So.2d 1085 (Ala. 1991). The claim in Count III appears to be an action against Sheriff Morgan because the drug task force, which included his employees and those deputized by him, committed the tort alleged in this count. See Id., at 1088. The claim is against the Sheriff not for his "actions as an individual, but upon his official position as 'employer' of" those participating in the raids. See Id.

The facts are undisputed that Chief Morgan and Officer Dendinger participated in the alleged raids. Chief Morgan has attested that none of his officers pointed a gun at anyone and that he saw no officers assault anyone. The Plaintiffs have alleged that guns were pointed at those present in the club and that they were not free to leave and that they were threatened and questioned, although the Plaintiffs have not produced evidence that the Chief himself or Officer Dendinger held a gun on anyone. The Court finds, however, that the Plaintiffs have come forward with sufficient evidence to create a genuine

issue of material fact as to whether the raid that these Defendants engaged in restricted the Plaintiffs' freedom of movement and would have caused a reasonable person to feel threatened; and as to whether these Defendants, while inside the bar, restricted anyone's freedom of movement. See CODE OF ALABAMA [1975], § 6-5-170 ("false imprisonment [is] the unlawful detention of another for any length of time whereby he is deprived of his personal liberty"); *Evans v. Walker*, 237 Ala. 385, 187 So. 189 (1939) (officer's use of excessive force can constitute an assault and battery); see also *City of Birmingham v. Thompson*, 404 So.2d 589 (Ala. 1981). At this stage of the proceedings, the Court will not dismiss Count III as to these two Defendants.

As to Count IV, the only defense argument for summary judgment that relates to this count appears to be those stated in the previous motions to dismiss filed by these Defendants. The Court denied these motions in its order of January 22, 1992 on all defense motions to dismiss. The Plaintiffs have sued the Municipal Defendants in this count but have not named the individual Defendants other than to refer to them vaguely as "defendants known and unknown law enforcement officers and agencies." At this stage of the proceedings, the Court cannot conclude that this count should proceed against Officer Dendinger because the Plaintiffs have not come forward with any evidence to show that he was responsible for the hiring or training or supervision of anyone involved in the raids so as to hold him liable on this count. As to Defendant Chief Morgan, however, the facts are undisputed that he was the Chief of Police for the City of Wadley and, as such, would have been in a position to

hire or supervise or train. Count IV is due to be dismissed as to Officer Dendinger but will not be dismissed as to Chief Morgan.

MUNICIPAL DEFENDANTS
CHAMBERS COUNTY COMMISSION,
CITY OF WADLEY

Federal Claims: A municipality cannot be held liable under Section 1983 on a theory of respondeat superior. See *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658 (1978). The municipality can be liable, however, if its policy, custom, or practice is the moving force behind the constitutional wrong. Id.; *Hafer v. Melo*, 112 S.Ct. 358, 361-62 (1991). The policy need not have received final approval by the municipality, for the policy may be an alternative selected by the final decision-maker for the municipality in that particular area. See *Pembauer v. Cincinnati*, 475 U.S. 469, 481-84 & n.10 (1985) (citing *Monell*, 436 U.S. at 690-91).

The City of Wadley contends, and this Court agrees, that it cannot be held liable under Section 1983 on a theory of respondeat superior. This municipal defendant can be held liable on Counts I and II, however, for Chief Morgan's decision to participate in the allegedly illegal raids of the Capri Club under Section 1983 if Chief Morgan is the final policy-maker for the City in the area of law enforcement. See *Pembaur*, 475 U.S. at 481-84 & n.10. The parties have not briefed this issue, and the Court cannot grant summary judgment to these Defendants on a respondeat superior theory without some assertion that

the Plaintiffs cannot prove that Chief Morgan was the final policy-maker in this area.[13]

The Court finds that Sheriff Morgan, in his capacity as the chief law enforcement officer for the county, may have been the final policy maker for the County in making his decision to approve the allegedly illegal raids. See *Pembaur*, 475 U.S. at 481-84 & n.10; *Parker v. Williams*, 862 F.2d 1471, 1477-81 (11th Cir. 1989). The issue is whether Sheriff Morgan was the "ultimate repository of county authority" in making a decision as to law enforcement. See *Parker*, 862 F.2d at 1477-78. As the Sheriff of the County, he had to deputize officials from outside the county before they could even participate in the raids. See CODE OF ALABAMA [1975], § 36-22-3(4). His duty is that of ferreting out crimes and of apprehending and arresting criminals in his County, and the County Commission must furnish him with the necessary equipment, "including automobiles and necessary repairs," for that purpose. See Id.; CODE OF ALABAMA [1975], § 36-22-18. The Court is persuaded by the Plaintiffs that Sheriff Morgan may have been the final decision-maker for the County in ferreting out crime, although he is a State of Alabama employee. *See Parker*, 862 F.2d at 1475.

State Claims: Municipalities, unlike the State, can be held liable under Alabama law for the negligent or

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[13] The question of whether an official is the final decision-maker in a particular area is a matter of state law. See *Brown*, 923 F.2d at 1480 (citing *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701 (1989)). If State law does not assign to Chief Morgan the final authority to engage in search and seizures, then he cannot bind the City. Id.

unskilled acts of their agents or employees. See CODE OF ALABMA [1975], § 11-47-190; *Rich v. City of Mobile*, 410 So.2d 385, 387 (Ala. 1982); *Rutledge v. Baldwin County Comm'n*, 495 So.2d 49, 53 (Ala. 1986). While a municipality cannot be held liable for its agent's unlawful arrest and false imprisonment, see *Bovette v. City of Mobile*, 442 So.2d 61, 62 (Ala. 1983), a municipality can be held liable for an unskilled agent's assault, see *City of Birmingham v. Thompson*, 404 So.2d 589, 589-92 (Ala. 1981). A municipality can also be charged with its negligence in hiring or failing to supervise and train its agents. See *Seals v, City of Columbia*, 575 So.2d 1061, 1064 (Ala. 1991).

The Plaintiffs, having conceded that the State claims against Chambers County are barred for failure to file a claim with the County, Counts III and IV will be dismissed as to Chambers County.

As to the City of Wadley, it can be held liable on a respondeat superior theory for an unskilled agent's assault, but it cannot be held liable on that theory for false imprisonment. The assault claim against the City remains, but the claim of false imprisonment in Count III must be dismissed.

As to Count IV, the City of Wadley is charged not on a theory of respondeat superior, but on a theory of its own negligence in hiring, supervising and training its municipal employees. The parties have not disputed the City's responsibility in this area.

As to Counts III and IV, the Claims remaining against the City of Wadley are those relating only to the March, 1991, raid, as the claims relating to the December, 1990,

raid are barred by the Plaintiffs' failure to file their claims within six months of that raid.[14]

Conclusion. This Court concludes that the motions for summary judgment of all Defendants are due to be denied, with the exception that some of the claims as to some of the Defendants are due to be dismissed as noted in the above discussions. An Order will be entered in accordance with this Opinion.

DONE, this 2nd day of June, 1992.

/s/ R. E. Varner
R. E. VARNER
UNITED STATES DISTRICT JUDGE

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[14] See supra note 2.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

TOM SWINT; ET AL, Plaintiffs, vs. THE CITY OF WADLEY, ALABAMA; ET AL, Defendants.	)	CIVIL ACTION NO. 91V-965-E

ORDER

(Filed June 26, 1992)

This cause is now before this Court on Defendants' Motions to Reconsider filed herein June 12 and 15, 1992.[1]

The Defendants now urge this Court to find as an undisputed fact that the officers involved in the two raids of the Capri Club acted under exigent circumstances in invading the club to make a warrantless arrest of an individual who had just sold drugs to an undercover officer.[2] The facts this Court finds to be undisputed are

[1] Hereinafter, the City of Wadley Defendants include the City, the Police Chief Freddie Morgan, and Police Officer Gregory Dendinger, and the Chambers County Defendants include the County and Sheriff James Morgan.

[2] The Chambers County Defendants have submitted revised affidavits "to address the concerns of this Court regarding whether exigent circumstances were present." (Chambers County Defendants' Motion for Reconsideration, p. 3). The City of Wadley Defendants state: "It is hard to believe that you would question the officers exigent circumstances, in light of the fact, the officers didn't know until they actually made the buy who was selling drugs." (City of Wadley Defendants' Brief filed June 12, 1992, p. 3).

that these officers had time to organize a team of 30 to 40 armed officers for the purpose of invading the Capri Club on two different occasions, yet these officers did not have time to obtain the independent and neutral judgment of a magistrate that there was probable cause to believe that drugs were being sold in the Club and that a raid was necessary to obtain evidence of criminal conduct from certain named individuals suspected of using the club to carry on their drug trade.[3] What concerns, and shocks, this Court is the premeditated show of force and the restriction of the freedom of those persons in the club who did not shed their constitutional rights at the door. See *Ybarra v. Illinois*, 444 U.S 85, 91 (1979); *Graham v. Connor*, 490 U.S. 386, 1094 S.Ct. 1865 (1989) [Fourth

[3] Investigator Birchfield's revised affidavit further convinces this Court that its denial of summary judgment was proper. (Birchfield Affidavit dated June 15, 1992, attached to Chambers County Defendants' Motion for Reconsideration). Investigator Birchfield admits that "a warrant to search the entire club would limit the ability to search suspected individual drug dealers." Id., ¶ 16. This implies that the purpose of the raid was to gather evidence of criminal conduct from suspected drug dealers. Plaintiff Lewis, as now admitted by the City of Wadley Defendants, was a suspected drug dealer. (See City of Wadley Defendants' Motion to Reconsider, p. 2; Affidavit of Chief Freddie Morgan dated June 10, 1992). Even those suspected of crime cannot be searched without a warrant unless carefully guarded exceptions to a warrant exist under the circumstances. See *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971).

Amendment inquiry is what force was "objectively reasonable" under the circumstances]. Furthermore, this Court finds that the Plaintiffs have come forward with sufficient evidence on their equal protection claim to create a genuine issue of material fact as to whether these two raids were racially motivated.[4]

The Chambers County Defendants correctly point out that whether Sheriff James Morgan was the final policy maker is a question of law that this Court can decide. What the Court decided in its June 2, 1992, Opinion and Order was that the Plaintiffs had come forward with sufficient evidence to persuade this Court that Sheriff Morgan may be the final policy maker for the County. The parties will have an opportunity to convince this Court that Sheriff Morgan was or was not the final policy maker for the County, and the Court will make a ruling as a matter of law on that issue before the case goes to the jury.[5] See *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1480-81 & nn. 10, 11 (11th Cir. 1991)

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[4] The Defendant City contends that this Court erred in finding as a undisputed fact that Officer Dendinger made a comment to a Mattie Staples that "he was going to stop people from coming the Club Capri, . . . that the white people did not cause any trouble and he was going to straighten the black people out." (Staples Affidavit attached as an exhibit to Plaintiff's response to the City's Motion for Summary Judgment). The City of Wadley did not provide in its summary judgment materials the deposition testimony of Officer Dendinger, which testimony it now provides with its Motion to Reconsider, to contradict Ms. Staples' affidavit. The Court considers this affidavit, however, sufficient evidence to create a genuine issue of material fact as to whether the raids may have been racially motivated.

[5] The City of Wadley defendants urge that Chief Freddie Morgan was not the policy maker for the City when he participated in the raids because the raids were controlled by the policy of Sheriff James Morgan. Chief Morgan, however, made the decision to participate in the raids, and whether he made this decision as the final policy maker for the City is a question this Court will decide before the case goes to the jury. See *Pembaur v. Cincinnati*, 475 U.S. 469, 483-84 (1985).

This Court is of the opinion that summary judgment was properly denied Defendants in its Opinion and Order dated June 2, 1992.[6] Accordingly, it is ORDERED by this Court that Defendants' Motions to Reconsider filed herein June 12 and 15, 1992, be, and the same are hereby, DENIED.[7]

DONE this 26th day of June, 1992.

/s/ R. E. Varner
R. E. VARNER
UNITED STATES
DISTRICT JUDGE

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[6] The City of Wadley Defendants urge further that this Court also erred in its ruling on the state claims. The Court remains with its conclusion that the Plaintiffs came forward with sufficient evidence to create a genuine issue of material fact as to whether the raids, and their show of force, might be considered excessive force under the circumstances sufficient to constitute a civil assault.

[7] The Court notes that the Chambers County Defendants indicated in their June 15, 1992, Motion for Reconsideration that supporting briefs would be filed within seven days. As of the date of this Order, no such briefs have been filed, and this Court will not, at this date, await the filing of other materials before ruling on the pending motions for reconsideration.

STATUTES AND CONSTITUTIONAL PROVISIONS

42 U.S.C. § 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Article V, § 138 of the Alabama Constitution reads in relevant part of follows:

> A sheriff shall be elected in each county by the qualified electors thereof. . . .

Various statutes from the Alabama Code read in relevant part as follows:

§ 36-22-2:

> The sheriff must keep his office at the courthouse.

§ 36-22-3:

> It shall be the duty of the sheriff:
>
> * * * *
>
> (2) To attend upon the circuit courts and district courts held *in his county* when in session and the courts of probate, when required by the judge of probate, and to obey the lawful orders and directions of such courts.
>
> (3) The sheriff *of each county* must, three days before each session of the circuit court *in his county*, render to the *county treasury* or custodian of *county funds* a statement in writing and on oath of the moneys received by him *for the county*, specifying the amount received in each case, from whom and pay the amount to the *county treasurer* or custodian of *county funds*.
>
> (4) It shall be the duty of sheriffs *in their respective counties*, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes *in their counties* and to present a report of the evidence so secured to the district attorney or assistant district attorney *for the county*.

(emphasis added)

§ 36-22-5:

> The sheriffs in *their respective counties*, whenever directed to do so in writing by the district attorney or by the attorney general or governor, shall make special investigation of any alleged violation of the law *in their counties* and shall prepare a written report setting forth what information has been obtained as a result of such investigation together with the names of such witnesses as have been secured with a summary of what can be proven by such witnesses, which report shall promptly after its preparation be presented to the official who directed the investigation and, if such official shall be the governor or attorney general, he

may present it to any solicitor prosecuting criminal cases *in the county*. The sheriff *of the county* shall proceed promptly by himself or by a competent deputy of experience and fidelity to make such investigation when directed as aforesaid.

(emphasis added)

36-22-6:

(a) The expense of a special investigation when ordered as provided in section 36-22-5 shall be paid *from the county treasury*, upon a warrant properly drawn. After the report is made, the sheriff shall file *with the county commission* a detailed sworn statement of his expenses accompanied by the written approval of the officer directing the investigations, and *the county commission* shall audit and allow only so much thereof as it shall find reasonably necessary unless it is approved by the governor or attorney general, in which event they shall allow the money approved. The allowed expenses must be paid in each case *from the county treasury* upon a warrant drawn according to law.

(emphasis added)

§ 36-22-13:

The books required to be maintained [by the Sheriff] by this article must at all times be open to the inspection of the public, free of charge, and must, at the expiration of his official term, be turned over to his successor in office. When a book has been completely filled or used up it must be deposited and kept in the office of the clerk of the circuit court *of the county*.

(emphasis added)

§ 36-22-16:

(a) Sheriffs of the several counties in this state shall be compensated for their services by an annual salary payable in equal installments *out of the county treasury* as the salaries of other county employees are paid. The annual salary of the sheriff shall be $35,000.00, commencing with the next term of office, unless a higher salary is specifically provided for by law by general or local act hereafter enacted.

(emphasis added)

§ 36-22-17:

All fees, commissions, percentages, allowances, charges and court costs heretofore collectible for the use of the sheriff and his deputies, excluding the allowances and amounts received for feeding prisoners, which the various sheriffs of the various counties shall be entitled to keep and retain, except in those instances *where the county commission directs* such allowances and amounts to be paid *into the general fund of the county* by proper resolution passed *by said county commission of said county*, shall be collected and paid *into the general fund of the county*.

(emphasis added)

§ 36-22-18:

The county commission shall also furnish the sheriff with the necessary quarters, books, stationery, office equipment, supplies, postage and other conveniences and equipment, including automobiles and necessary repairs, maintenance

and all expenses incidental thereto, as are reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office.

(emphasis added)

§ 36-22-19:

The county commission of each of the several counties of the state may, in its discretion and upon application of the sheriff *of the county*, pay the sheriff's membership dues in the Alabama sheriffs association each year and also the sheriff's membership dues in the national sheriffs association each year.

The cost of any such membership dues, upon approval by the county commission, may be paid out of the *general fund of the county commission*.

(emphasis added)

§ 36-22-42:

The *governing body of each county* shall begin deducting on October 10, 1975, and each month thereafter from the salaries of such sheriffs an amount equal to four percent of the monthly salary paid such official up to $25,000.00. Such sum shall be deducted monthly and paid *into the general fund of the county*.

(emphasis added)

§ 11-1-11:

(a) The county commission of the several counties of the state are hereby authorized to pay all dues, fees and expenses of the sheriffs, tax assessors, tax collectors, circuit clerks and

registers and license commissioners or other like officials in their respective counties that are incurred by such individuals through membership in and/or attendance at official functions of their state organizations.

(b) Such dues, fees and expenses may be paid from the general fund of each county.

§ 11-2-30:

Upon the application of five or more resident freeholders of the county, addressed to the judge of the circuit court, and verified by the oath of one or more of the applicants, alleging that the bond of the judge of probate or the clerk of the circuit court or of the sheriff or of the tax assessor or of the tax collector or of the county treasurer is for any cause insufficient and setting forth the grounds upon which the allegation is based, such officer may be required to make a new bond, if, upon the hearing of such application by the circuit court judge, it shall appear that the bond is for any cause insufficient.

No. 93-1636

In The

Supreme Court of the United States

October Term, 1993

TOM SWINT, TONY SPRADLEY,
DRUCILLA JAMES and JEROME LEWIS,

Petitioners,

v.

CHAMBERS COUNTY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

KENDRICK E. WEBB
Counsel of Record
BART HARMON
Co-Counsel
WEBB & ELEY
166 Commerce Street, Suite 300
Post Office Box 238
Montgomery, Alabama 36101-0238
(205) 262-1850
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Eleventh Circuit's construction of Alabama law on the issue of whether a sheriff, a state officer, is a final policymaker for the county with respect to law enforcement is entitled to deference pursuant to *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), and *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701 (1989)?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

STATUTORY PROVISIONS:

TABLE OF AUTHORITIES – Continued

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Respondent Chambers County Commission respectfully requests that the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no federal constitutional provisions directly at issue in the question raised by the Petition for a Writ of Certiorari. The statutory provisions involved are

42 U.S.C. § 1983 and 42 U.S.C. § 1985. The texts of these statutory provisions are reproduced in the Appendix, App. 1-3.

State constitutional provisions which are relevant to the issues before the Court include Alabama Constitution of 1901, Article V, § 112; Article V, § 138; Article VII, § 174; and Amendment. No. 35. State statutory provisions involved include Alabama Code §§ 36-21-10, 36-21-46 and 36-22-16 (1975). The texts of these statutory provisions are reproduced in the Appendix, App. 3-9.

STATEMENT OF THE CASE

Upon review of the Petitioners' "Statement of the Case", Respondent Chambers County Commission does not perceive any misstatements of the facts which would have a bearing on the "question of what issues would properly be before the Court if certiorari were granted."

REASONS NOT TO GRANT THE WRIT

THE ELEVENTH CIRCUIT'S CONSTRUCTION OF ALABAMA LAW ON THE ISSUE OF WHETHER A SHERIFF, A STATE OFFICER, IS A FINAL POLICY-MAKER FOR THE COUNTY WITH RESPECT TO LAW ENFORCEMENT IS ENTITLED TO GREAT DEFERENCE PURSUANT TO *PEMBAUR V. CINCINNATI*, 475 U.S. 469 (1986), *ST. LOUIS V. PRAPROTNIK*, 485 U.S. 112 (1988), AND *JETT V. DALLAS INDEP. SCHOOL DIST.*, 491 U.S. 701 (1989) AND, THEREFORE, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

A. THE DECISION OF THE ELEVENTH CIRCUIT IS IN ACCORD WITH THIS COURT'S DECISIONS IN *PEMBAUR V. CINCINNATI*, 475 U.S. 469 (1986), *ST. LOUIS V. PRAPROTNIK*, 485 U.S. 112 (1988), AND *JETT V. DALLAS INDEP. SCHOOL DIST.*, 491 U.S. 701 (1989).

Petitioners challenge the Eleventh Circuit's determination that Alabama sheriffs are not final county policymakers with respect to law enforcement because the decision is, in their view, inconsistent with this Court's holding in *Pembaur v. Cincinnati*, 475 U.S. 469 (1986) (plurality opinion). Indeed, *Pembaur* did accept the Sixth Circuit's conclusion that, under Ohio law, sheriffs and prosecutors are county officials authorized to establish official policy for their county with respect to law enforcement. 475 U.S. at 476. However, *Pembaur* cannot fairly be characterized as establishing a universal principle that, under the laws of all states, sheriffs will be considered final policymakers for counties with respect to law enforcement activities. To the contrary, *Pembaur* and its progeny recognize that since no two states are going to

define policymaking authority identically, the various circuit courts of appeal should make independent evaluations of each state's law and these evaluations are due to be afforded "great deference." *See Pembaur,* 475 U.S. at 484 & n. 13; *St. Louis v. Praprotnik,* 485 U.S. 112, 124-25 (1988) (plurality opinion); *Jett v. Dallas Indep. School Dist.,* 491 U.S. 701, 737-78 (1989) (plurality opinion). Because the Eleventh Circuit properly based its decision on an analysis of Alabama law, the holding below is consistent with the legal principles articulated in *Pembaur.*

In *Pembaur,* this Court wisely refused to delve into the minutiae of Ohio state law and re-examine the Sixth Circuit's basis for holding Ohio counties liable for the misconduct of sheriffs and prosecutors. Instead, the Court merely accepted the Sixth Circuit's determination as being the "definitiv[e] constru[ction]" of Ohio law and proceeded to analyze the county's liability under § 1983. 475 U.S. at 491. (O'Connor, J., concurring). Justice Brennan, writing for the majority, consistently referred to the description of Ohio sheriffs as final county policymakers as being the Sixth Circuit's conclusion, not the conclusion of this Court.

> Based upon *its* examination of Ohio law, the *Court of Appeals* found it "clea[r]" that the Sheriff and the Prosecutor were both county officials authorized to establish "the official policy of Hamilton County" with respect to matters of law enforcement.

475 U.S. at 476 (citation omitted) (emphasis added); *see also* 475 U.S. at 484 ("[T]he *Court of Appeals* concluded, based upon *its* examination of Ohio law. . . . ") (emphasis added). Because the Sixth Circuit's determination on the

issue of final policymaking authority necessarily arose out of state law, *Pembaur,* 475 U.S. at 483, this Court, as is its practice in matters involving state law, afforded the determination "great deference." 475 U.S. at 484, n. 13 (*citing United States v. S.A. Empresa de Viacao Aerea Rio Grandense,* 467 U.S. 797, 815, n. 12, 104 S.Ct. 2755, 2766. n. 12, 81 L.Ed.2d 660 (1984), *Brockett v. Spokane Arcades, Inc.* 472 U.S. 491, 499-500, 105 S.Ct. 2794, 2799-2800, 86 L.Ed.2d 394 (1985) (citing cases) and *Bishop v. Wood,* 426 U.S. 341, 345-347, 96 S.Ct. 2074, 2077-2078, 48 L.Ed.2d 684 (1976)).

Since *Pembaur,* this Court has revisited the question of final policymaking liability in two cases which are not cited in the Petition for a Writ of Certiorari. Although neither of the cases involve county sheriffs, both look to state law on the issue of final policymaking authority and, just as significantly, defer to the court of appeal's construction of state law.

In *St. Louis v. Praprotnik,* 485 U.S. 112 (1988) (plurality opinion), the plaintiff, once a management-level city employee, contended that the City demoted him and terminated his employment without due process of law and in retaliation for the exercise of protected free speech. 485 U.S. at 114-17. Instead of looking to state law to see where final policymaking authority for employment was vested as *Pembaur* suggested, the court of appeals ignored the most relevant portions of state law and broadly defined the term "municipal policymaker" to find municipal liability. *Praprotnik,* 485 U.S. at 131. This Court reversed the Eighth Circuit with the warning that "[a] federal court would not be justified in assuming that municipal policymaking authority lies somewhere other

than where the applicable law purports to put it." *Id.* at 126. Furthermore, the Court recognized that since states have "wide latitude" in structuring the powers given to local government, logically, there will be a variety of results in the matter of where final policymaking authority is reposed. *Id.* at 124-25.

Most recently, in *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701 (1989) (plurality opinion), this Court addressed the issue of final policymaking authority in yet another context. In *Jett*, a high school football coach alleged that both the school principal and district superintendent had him demoted and transferred in retaliation for the exercise of protected free speech and because of racial animosity. 491 U.S. at 705-07. Jett sued the school district and the federal district court found that the school district had delegated to the principal and superintendent final policymaking authority in the matter of employment. *Id.* at 708. From a substantial plaintiff's verdict, the school district appealed on the ground that the plaintiff had failed to prove that the individual defendants' conduct represented official school district policy. *Id.* The Fifth Circuit Court of Appeals agreed with the school district and reversed. This Court granted the Petition for a Writ of Certiorari. Although generally affirming the Fifth Circuit's reversal of the district court, this Court remanded the issue of final policymaking authority to the Court of Appeals with instructions for the court to examine Texas law on the issue. *Id.* at 737-38. Again, great deference was shown to the court of appeals' determination as to state law: "We think the Court of Appeals, whose expertise in interpreting Texas law is greater than our own, is in a better position to determine whether [the individual

defendants] possessed final policymaking authority. . . . " *Id.* at 738.

Petitioners, by their insistence that the Eleventh Circuit strayed from the course of this Court's guidance on the issue of final policymaking authority, make the mistake of "overlooking the forest for the trees." While carefully following the guidelines set out by *Pembaur, Praprotnik,* and *Jett,* the Eleventh Circuit analyzed Alabama law and simply came to a different conclusion than did the Sixth Circuit in *Pembaur* after analyzing Ohio law. The Eleventh Circuit acknowledged that its duty under *Pembaur, Praprotnik,* and *Jett* was to examine Alabama law to determine whether the sheriff exercises final policymaking authority for the county in the area of law enforcement. *Swint v. City of Wadley, Ala.*, 5 F.3d 1435, 1450 (11th Cir. 1993), *opinion modified*, 11 F.3d 1030 (11th Cir. 1994).

In conducting its analysis of state law on this issue, the Eleventh Circuit chose to rely primarily on two factors. First, the court looked to the holding of the Alabama Supreme Court in *Parker v. Amerson*, 519 So.2d 442 (Ala. 1987). In *Parker*, the Alabama Supreme Court recounted the turn of the century controversy in Alabama over whether the sheriff should be accountable to county government or to the State of Alabama. Apparently, in the years leading up to Alabama's Constitutional Convention of 1901, Alabama law had placed the county sheriff under the authority of local officials. However, the local authorities had proven unable to effectively prevent the local sheriffs' misconduct. "[C]ounty courts [had failed] to punish sheriffs for neglect of duty and [the] sheriffs'

acquiescence in mob violence and ruthless vigilantism." *Parker*, 519 So.2d at 443. In response to these concerns, Alabama revised the state constitution making the sheriff an executive officer of the *state*. *See* Ala. Const. of 1901, art. V, § 112, App. 3. The practical effect of this change was that, "sheriffs were made more accountable to the supreme executive officer of the state, the Governor. . . . and the [Alabama] Supreme Court [obtained] original jurisdiction to hear impeachment proceedings against sheriffs." *Parker*, 519 So.2d at 444. *See* Ala. Const. of 1901, art. V, § 138, App. 3; Ala. Const. of 1901, art. VII, § 174, App. 3, 4; Ala. Const. of 1901, amend. No. 35, App. 4. Based upon the plain language of the Alabama Constitution and the history behind it, the Alabama Supreme Court concluded, in response to the certified question before it, that "[a] sheriff is not an employee of a county for purposes of imposing liability on the county under a theory of respondeat superior." *Parker*, 519 So.2d at 442.

The Eleventh Circuit also looked at the unique limitations placed upon county authority by Alabama law. Alabama counties are "authorized to do only those things permitted or directed by the legislature of Alabama." *Lockridge v. Etowah County Comm'n*, 460 F.2d 1361, 1363 (Ala.Civ.App. 1984). Consequently, Alabama counties have no inherent "police powers", are unable to enact or enforce criminal codes, and must rely exclusively upon the state and its agents for law enforcement. Therefore, the Eleventh Circuit was justified in concluding that "Sheriff Morgan is not the final repository of Chambers County's general law enforcement authority, because [the county] has [no law enforcement authority]". *Swint*, 5 F.3d at 1451.

Other aspects of Alabama law not mentioned in the opinion below illustrate the correctness of the Eleventh Circuit's conclusion. Alabama sheriffs and their deputies, as state officers, are immune from suit in both state and federal court. *See Carr v. City of Florence*, 916 F.2d 1521 (11th Cir. 1990); *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989); *Parker v. Amerson*, 519 So.2d 442. Alabama county commissions have no authority over the sheriff's personnel decisions as they relate specifically to his deputies. *See Terry v. Cook*, 866 F.2d 373, 379 (11th Cir. 1989). Under Alabama law, the minimum training requirements of sheriff's department employees are established by the state rather than the county and the training is supervised by a state agency. *See* Ala. Code § 36-21-46 (1975).[1] Finally, although compensation for sheriffs and their deputies is obtained from the county treasury, state law establishes their rate of compensation. Ala. Code §§ 36-22-16, 36-21-10 (1975).

Upon their own independent analyses of Alabama law, three Alabama federal district judges have also concluded that Alabama sheriffs are not final policymakers for the county with respect to law enforcement. *See Forehand v. Roberts*, No. CV-92-A-601-N, slip op. at 2-3 (M.D. Ala. August 11, 1992) (Albritton, J.); *Smith v. Arndt*, No. CV-92-H-1227-NE, slip op. at 2-3 (N.D. Ala. July 14, 1992) (Hancock, J.); *Sanders v. Miller*, No. CV-91-N-2804-NE, slip

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[1] *Compare Davis v. Mason County*, 927 F.2d 1473, 1481 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 275 (1991). As one ground for holding the county liable for acts of sheriff's deputies, the Ninth Circuit found that the state merit law did *not* cover the training of sheriff's deputies.

op. at 4-7 (N.D. Ala. April 13, 1992) (Nelson, J.). Based upon the same reasoning in *Pembaur* and *Jett* that the courts of appeal have considerable acumen in construing state law and should therefore be given deference concerning state law questions, the district courts should likewise be afforded substantial deference. *Cf. Bishop v. Wood*, 426 U.S. at 345. (United States Supreme Court would defer to district court's determination of whether police officer was an "at will" employee under state law).

Because the reasoning of the Eleventh Circuit in the opinion below is in complete accord with this Court's holdings in *Pembaur, Praprotnik*, and *Jett*, the Petition for a Writ of Certiorari is due to be denied.

B. ALTHOUGH THE LAWS OF INDIVIDUAL STATES VARY IN THE WAY LAW ENFORCEMENT AUTHORITY IS ALLOCATED BETWEEN STATE AND COUNTY GOVERNMENTS, THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE PREEMINENCE OF STATE LAW IN THE DETERMINATION OF WHERE FINAL COUNTY POLICYMAKING AUTHORITY IS REPOSED.

Petitioners attempt to manufacture a conflict among the circuit courts of appeal by emphasizing the fact that some circuits have found sheriffs to be final policymakers for the county while other circuits have come to the opposite conclusion. Certainly, several circuits, after analyzing state law, have denominated sheriffs to be final policymakers for the county with respect to law enforcement. *See, e.g., Pembaur v. City of Cincinnati*, 746 F.2d 337, 341 (6th Cir. 1984) (Upon detailed review of Ohio statutes, the court found Ohio sheriffs to be county officers

and the final repository of county law enforcement authority); *Turner v. Upton County, Texas*, 915 F.2d 133, 136 (5th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991) (Considering "unique structure of county government in Texas," the court found the county liable for the sheriff's acts and acknowledged that "[it] has long been recognized that, in Texas, the county sheriff is the county's final policymaker in the area of law enforcement. . . . "); *Davis v. Mason County*, 927 F.2d 1473, 1480 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 275 (1991) (Applying Washington state law, the court found the sheriff to possess final county authority for the training of his deputies); *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989) (The court remanded intimating that under Arizona law county could be "automatically" liable for the acts of the sheriff). Even the Eleventh Circuit found that, under Florida law, sheriffs are final policymakers with respect to county law enforcement. *See Lucas v. O'Loughlin*, 831 F.2d 232, 234-35 (11th Cir. 1987), *cert. denied*, 485 U.S. 1035 (1988).

At least two other circuit courts, after analyzing the laws of a particular state within their circuit, have refused to find that sheriffs are the final policymaking authority for the county. *See Soderbeck v. Burnett County, Wis.*, 821 F.2d 446, 451 (7th Cir. 1987) (County not liable for acts of sheriff because Wisconsin Supreme Court had conclusively ruled that Wisconsin sheriffs are state officers accountable only to the state); *Meade v. Grubbs*, 841 F.2d 1512, 1528 (10th Cir. 1988) (Oklahoma counties were not liable for the acts of sheriff's deputies because the counties "ha[ve] no statutory duty to hire, train, supervise or discipline the county sheriffs or their deputies."); *see also Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989), *cert.*

denied, 495 U.S. 929 (1990) (holding that Cook County Illinois is not responsible for jail personnel policies because the sheriff is the sole authority with respect to jail employees, and "[t]he sheriff is an independently-elected constitutional officer who answers only to the electorate, not to the Cook County Board of Commissioners"); *Baez v. Hennessy*, 853 F.2d 73, 77 (2nd Cir. 1988), *cert. denied*, 488 U.S. 1014 (1989) (holding that New York counties were not liable for county district attorneys prosecuting criminal matters because the district attorneys, when pursuing prosecutions, represented the state and not the county); *Wing v. Britton*, 748 F.2d 494, 498 (8th Cir. 1984) (Arkansas cities could not be liable for the acts of deputies because under Arkansas law, police chiefs were exclusively responsible for deputies); *Owens v. Fulton County*, 877 F.2d 947, 950-51 (11th Cir. 1989) (Under Georgia law, district attorneys, when prosecuting state laws, are not final policymakers for the county despite the fact that they are elected solely by county voters).

There is no conflict among the circuits over the preeminance of state law in the determination of when an official is to be considered a final policymaker. Because the different circuit courts of appeals are construing the laws of different states, a variance of results should be expected. *See Praprotnik*, 485 U.S. at 124-25. Apparently, the Petitioners would have the circuit courts of appeals abide by a "one size fits all" jurisprudence of final policymaking authority. Not only is such a request illogical, it is directly contrary to the dictates of *Pembaur*, *Praprotnik*, and *Jett*. Regardless of how Ohio, Texas, Florida, or any other state allocates law enforcement authority between state and local government officials, Alabama law, as

discussed *supra*, makes it clear that the sheriff, when enforcing the state's criminal code, is a repository of state, not county, law enforcement authority. Under Alabama law, there is no such thing as county law enforcement authority. Accordingly, the Petition for a Writ of Certiorari should be denied because there is no conflict among the circuits.

C. THIS CASE DOES NOT RAISE AN ISSUE OF FEDERAL LAW.

Petitioners contend that the question presented in their Petition for a Writ of Certiorari involves an important federal question. However, this Court noted in *Praprotnik* that "the identification of policymaking officials is not a question of federal law," but rather, it is a question of state law. 485 U.S. at 124.

CONCLUSION

Based upon the foregoing, Respondent Chambers County Commission respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

KENDRICK E. WEBB
Counsel of Record
BART HARMON
Co-Counsel
WEBB & ELEY
166 Commerce Street, Suite 300
Post Office Box 238
Montgomery, Alabama 36101-0238
(205) 262-1850
Counsel for Respondent

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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42 U.S.C. § 1985.

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any

lawfully qualified person as an elector for President or States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Ala. Const. of 1901, art. V, § 112.

The executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county.

Ala. Const. of 1901, art. V, § 138.

A sheriff shall be elected in each county by the qualified electors thereof, who shall hold office for a term of four years, unless sooner removed, and he shall be ineligible to such office as his own successor; provided, that the

terms of all sheriffs expiring in the year nineteen hundred and four are hereby extended until the time of the expiration of the terms of the other executive officers of this state in the year nineteen hundred and seven, unless sooner removed. Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grievous bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached under section 174 of this Constitution. If the sheriff be impeached, and thereupon convicted, he shall not be eligible to hold any office in this state during the time for which he had been elected or appointed to serve as sheriff.

Ala. Const. of 1901, art. VII, § 174.

The chancellors, judges of the circuit courts, judges of the probate courts, and judges of other courts from which an appeal may be taken directly to the supreme court, and solicitors and sheriffs, may be removed from office for any of the causes specified in the preceding section or elsewhere in this Constitution, by the supreme court, under such regulations as may be prescribed by law. The legislature may provide for the impeachment or removal of other officers than those named in this article.

Ala. Const. of 1901, amend. No. 35 (amending art. V, § 138).

A sheriff shall be elected in each county by the qualified electors thereof who shall hold office for a term of four years unless sooner removed, and he shall be eligible to such office as his own successor. Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grevious [grievous] bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached, under section 174 of this Constitution. If the sheriff be impeached, and thereupon convicted, he shall not be eligible to hold any office in this state during the time for which he had been elected or appointed to serve as sheriff.

Ala. Code § 36-21-10 (1975).

(a) All law enforcement officers employed by any county of this state who is employed as a full-time law enforcement officer shall make at least $1,300.00 per month starting salary.

(b) The provisions of this section may be enforced in any court of competent jurisdiction in this state by an action brought by any citizen seeking a writ of mandamus, mandatory injunction or other proper remedy, and the court trying to cause may order the suspension or forfeiture of the salary, expenses or other compensation of the members of the governing body failing or refusing to comply with the provisions of this section.

(c) Members of the governing body or sheriff of any county are hereby expressly prohibited form requiring law enforcement officers affected by this section to work any more hours than they were normally working in order to circumvent the provisions of this section.

(d) If for any reason any part of this section or its application to any person, body, or situation is held invalid, the remainder of this section and its application to any other person, body, or situation shall not be affected.

(e) The term "law enforcement officer" means any person whose duties involve police work and who are designated law enforcement officers by the Alabama Peace Officers Minimum Standards Act. (Acts 1984, No. 84-409, p. 958.)

Ala. Code § 36-21-46 (1975).

(a) The minimum standards provided in this subsection shall apply to applicants and appointees as law enforcement officers who are not law enforcement officers in the state on September 30, 1971, and to applicants and appointees who, though law enforcement officers on September 30, 1971, cease to be law enforcement offices before making application for employment as a law enforcement officer or being employed as a law enforcement officer. No city, town, county, sheriff, constable or other employer shall employ any such applicant who is not on September 30, 1971, a law enforcement officer and

who continues until the date of his application as a law enforcement officer unless such person shall have first submitted to the appointing authority an application for such employment verified by affidavit of the applicant and showing compliance with the following qualifications:

(1) AGE. – The applicant shall be not less than 19 nor more than 45 years of age at the time of appointment; provided, that for the purpose of calculating his age under this article, the time spent by any applicant on active duty in the armed forces of the United States of America, not exceeding four years, shall be subtracted from the actual age of such applicant who has attained the age of 40 years.

(2) EDUCATION. – The applicant shall be a graduate of a high school accredited with or approved by the state department of education or shall be the holder of a certificate of high school equivalency issued by general educational development.

(3) POLICE TRAINING. – Prior to appointment, the applicant shall have completed at least 240 hours of formal police training in a recognized police training school, which shall include the Federal Bureau of Investigation Police Training Academy or another training school approved by the commission; provided, that an applicant may be provisionally appointed without having completed the police training prescribed in this subdivision, subject to the condition that he shall complete such training within nine months after provisional appointment; and, should he fail to complete such training, his appointment shall be null and void.

(4) PHYSICAL QUALIFICATIONS. – The applicant shall be not less than five feet two inches nor more than six feet 10 inches in height, shall weigh not less than 120 pounds nor more than 300 pounds and shall be certified by a licensed physician designated as satisfactory by the appointing authority as in good health and physically fit for the performance of his duties as a law enforcement officer. The commission may for good cause shown permit variances from the physical qualifications prescribed in this subdivision.

(5) CHARACTER. – The applicant shall be a person of good moral character and reputation. His application shall show that he has never been convicted of a felony or a misdemeanor involving either force, violence or moral turpitude and shall be accompanied by letters from three qualified voters of the area in which the applicant proposes to serve as a law enforcement officer attesting his good reputation.

(b) The foregoing requirements shall not apply to any person who is presently employed as a law enforcement officer in the state and who continues to be so employed when he makes application for or is employed as a law enforcement officer in a different capacity or for a different employer. (Acts 1971, No. 1981, p. 3224, § 7; Acts 1971, 3rd Ex. Sess., No. 156, p. 4399, § 1.)

Ala. Code § 36-22-16 (1975).

(a) Sheriffs of the several counties in this state shall be compensated for their services by an annual salary payable in equal installments out of the county treasury as the salaries of other county employees are paid. The annual salary of the sheriff shall be $35,000.00, commencing with the next term of office, unless a higher salary is specifically provided for by law by general or local act hereafter enacted.

(b) Such salary shall be in lieu of all fees, compensation, allowance, percentages, charges and costs, except as otherwise provided by law. The sheriff and his deputies shall, however, be entitled to collect and retain such mileage and expense allowance as may be payable according to law for returning or transferring prisoners and insane persons to or from points outside the county. (Acts 1969, No. 1170, p. 2179 § 1; Acts 1971, No. 77, p. 339; Acts 1973, No. 193, p. 229; Acts 1978, No. 538, p. 596; Acts 1981, No. 81-667, p. 1091; Acts 1985, No. 85-518, p. 612.)

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(3)

No. 93-1636

In The

Supreme Court of the United States

October Term, 1993

TOM SWINT, et al.,

Petitioners,

v.

CHAMBERS COUNTY COMMISSION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY MEMORANDUM

ROBERT B. MCDUFF*
771 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

CARLOS A. WILLIAMS
Post Office Box 306
Mobile, Alabama 36601
(205) 434-2478

BRYAN STEVENSON
114 North Hull Street
Montgomery, Alabama 36104
(205) 269-1803

Counsel for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 pp

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PETITIONER'S REPLY MEMORANDUM

Contrary to the Respondents' portrayal, this is not a case about the proper interpretation of Alabama state law. After examining Alabama law, the Eleventh Circuit held that the State had not assigned the counties any law enforcement authority independent of that exercised by the sheriffs within the borders of a given county. Pet. App. 33a-34a; *Swint v. City of Wadley, Alabama*, 5 F.3d 1435, 1451 (11th Cir. 1993), *on rehearing*, 11 F.3d 1040 (11th Cir. 1994). The dispute here is not over the Eleventh Circuit's construction of state law, but over whether that construction automatically removes counties from any liability for the actions of sheriffs under § 1983. The Eleventh Circuit held that it does. *Id.* However, as noted

in the petition, pp. 6-13, this Court and at least three other courts of appeals have reached contrary conclusions although the relevant principles of state law were identical in those cases to the principles in Alabama. Indeed, the reasoning of the Eleventh Circuit in this case could be applied to most states, if not all, creating a situation where counties are never liable to citizens under § 1983 for constitutional injuries occurring in the realm of law enforcement.

The crux of the Respondents' characterization of this as a state law dispute is contained at pp. 7-8 of their brief, where they contend that the Eleventh Circuit's holding was based on unique or particular features of Alabama law. First, they cite the Eleventh Circuit's statement that Alabama sheriffs are considered state officials under state law. Yet the Eleventh Circuit specifically held that this point was not controlling. Pet. App. 32a-33a; 5 F.3d at 1450. (If the point were controlling, the Eleventh Circuit would be in conflict with the Fifth Circuit's decision in *Crane v. Texas*, 766 F.2d 193, 195 (5th Cir.), *cert. denied*, 474 U.S. 1020 (1985), as mentioned at p. 12 of the petition for certiorari).[1] Second, they cite the Eleventh Circuit's statement that "Alabama counties are 'authorized to do only those things permitted or directed by the legislature.' "

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[1] Justice O'Connor's plurality opinion in *St. Louis v. Prapotnik*, 485 U.S. 112, 126 (1988), stated: "If . . . a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, § 1983 could not serve its useful purpose." Similarly, if states could insulate their counties from liability simply by labeling sheriffs and others who operate on the local level as "state officials," § 1983 would easily be thwarted.

Pet. App. 33a, 5 F.3d at 1451 (citation omitted). However, this is no different from the principle in most states, if not all. Counties are creatures of the states and in most states are limited to those powers permitted by state law. *See*, Sands & Libonati, *Local Government Law*, §§ 3.01, 8.01. Thus, the Eleventh Circuit's holding is not grounded upon anything that is unique or particular about Alabama law.[2]

Indeed, as explained at pp. 7-13 of the petition, with respect to the principles of state law that this Court and most of the courts of appeals have deemed to be relevant in determining § 1983 liability, Alabama is no different than the other states at issue in the conflicting cases. It is not as if in Ohio, Texas, Arkansas, Massachusetts, and Arizona (which are the states involved in the conflicting cases discussed in the petition), county commissioners ride with the sheriff in the patrol car, or supervise the sheriff's law enforcement actions, or have carte blanch under state law to rewrite the state's criminal code. Counties in those states have no more law enforcement power than do counties in Alabama. As with the sheriffs in Alabama, sheriffs in those states are elected by the

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[2] The Respondents also contend at p. 9 of their brief that "Alabama sheriffs and their deputies, as state officers, are immune from suit in both state and federal court." The Eleventh Circuit never relied upon this in its holding. Moreover, as is clear from the cases cited by the respondents, Alabama sheriffs are immune in their *official* capacity as officers of the state, just as the state is immune, but not in their *individual* capacity. Moreover, as the Eleventh Circuit noted in this case, the question of county liability is not grounded upon the characterization of the sheriff as a state official. Pet. App. 32a-33a; 5 F.3d at 1450.

county's voters, exercise law enforcement powers within the county's borders and independent of other county officials, and receive their salary and expenses from county funds.

In the conflicting cases cited in the petition stemming from those states, these principles of state law led the courts to the conclusion that counties could be liable for the actions of sheriffs in the realm of law enforcement. However, the Eleventh Circuit held there can be no county liability in that realm even though the principles of state law are the same.[3] Thus, this case raises not a question of state law, but a question of when county liability exists under § 1983 in the realm of law enforcement and when it does not.

Because the relevant principles in Alabama are the same as in most, if not all, other states, the reasoning of

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[3] As noted at p. 11 of the Respondents' brief, the Seventh Circuit appears to take the same position as the Eleventh on this issue. *See, Soderbeck v. Burnett County*, 821 F.2d 446, 451 (7th Cir. 1987). However, the Respondents are incorrect to suggest that the Tenth Circuit also takes the same position. In the case cited by the respondents, *Meade v. Grubbs*, 841 F.2d 1512, 1528 (10th Cir. 1988), the Tenth Circuit dealt only with whether the County Commissioners had direct supervisory duties with respect to deputy sheriffs, but did not address whether the county was liable for the actions of the sheriff as a final county policymaker. Finally, the Respondents are incorrect at p. 11 in their characterization of the the Eleventh Circuit's decision involving Florida sheriffs, *Lucas v. O'Loughlin*, 831 F.2d 232, 234-35 (11th Cir. 1987), *cert. denied*, 485 U.S. 1035 (1988). The Eleventh Circuit did not hold that sheriffs are final policymakers in Florida with respect to law enforcement, but held only that they are final policymakers with respect to hiring and firing deputies.

the Eleventh Circuit's decision could easily be transported to other states, with the result that counties might never be liable, under any circumstances, for constitutional injuries to citizens. This is a case that is appropriate for this Court's review by way of a writ of certiorari.

Respectfully submitted,

ROBERT B. MCDUFF*
771 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

CARLOS A. WILLIAMS
Post Office Box 306
Mobile, Alabama 36601
(205) 434-2478

BRYAN STEVENSON
114 North Hull Street
Montgomery, Alabama 36104
(205) 269-1803

Counsel for Petitioners

*Counsel of Record

(5)

No. 93-1636

In The

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BRIEF FOR PETITIONERS

ROBERT B. MCDUFF*
771 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

CARLOS A. WILLIAMS
Post Office Box 306
Mobile, Alabama 36601
(205) 434-2478

BRYAN STEVENSON
BERNARD HARCOURT
114 North Hull Street
Montgomery, Alabama 36104
(205) 269-1803

Counsel for Petitioners
*Counsel of Record

37pp

QUESTION PRESENTED

Whether the Sheriff of a county is a final policymaker for the county in matters of law enforcement for purposes of county liability under 42 U.S.C. § 1983 in those jurisdictions where the Sheriff is elected by the voters of the county, the Sheriff's office is financed and the Sheriff's salary is paid by the county, and the Sheriff has unreviewable law enforcement authority within the county but not outside the county.

PARTIES

The parties in the court below are as follows:

Plaintiffs-Appellees: Tom Swint, Tony Spradley, Drecilla James, and Jerome Lewis.

Defendants-Appellants: Chambers County Commission, City of Wadley, Alabama, James C. Morgan, Freddie Morgan, and Gregory Dendinger.

The plaintiffs-appellees are petitioners in this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional and Statutory Provisions

Other Materials

No. 93-1636

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The November 3, 1993 opinion of the Eleventh Circuit is reported as *Swint v. City of Wadley, Alabama*, 5 F.3d 1435 (11th Cir. 1993), and is reproduced in the appendix to the petition for writ of certiorari, p. 1a. The January 18, 1994 opinion of the Eleventh Circuit on rehearing is reported as *Swint v. City of Wadley, Alabama*, 11 F.3d 1030 (11th Cir. 1994), and is reproduced in the pet. app., p. 41a. The June 2, 1992 and June 26, 1992 decisions of the United States District Court for the Middle District of Alabama are unreported and are reproduced in pet. app., p. 45a and p. 70a.

JURISDICTION

The opinion of the Eleventh Circuit was issued on November 3, 1993. Upon a suggestion for rehearing en banc, the panel issued a further opinion on January 18, 1994, modifying its prior opinion and announcing that the suggestion for rehearing en banc was denied. The petition for writ of certiorari was docketed April 18, 1994, and the petition was granted on June 13, 1994. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal statute involved is 42 U.S.C. § 1983. Article V, § 138 of the Alabama Constitution is relevant, as are various provisions of the Alabama Code, including §§ 36-22-2, 36-22-5, 36-22-6, 36-22-13, 36-22-16, 36-22-17, 36-22-18, 36-22-19, 36-22-42, 11-1-11, and 11-2-30. All of these provisions are set out verbatim in pet. app., pp. 74a-79a.

STATEMENT OF THE CASE

This case stems from two law enforcement raids on a nightclub in Chambers County, Alabama, known as the Capri Club. The plaintiffs in the case, who are petitioners in this Court, are two of the owners of the club, a club employee, and a club patron. Pet. App. 3a-4a; 5 F.3d at 1439.

After learning of allegations that narcotics transactions had taken place at the Club, the Sheriff of Chambers County authorized a raid involving 30 to 40 officers from various localities and law enforcement agencies. It occurred on December 14, 1990. An undercover officer went in the club and purchased marijuana and other drugs. This officer then left

the club and signaled the others. The raid began with eight SWAT team officers dressed in black, some wearing ski masks, followed immediately by the rest of the 30-40 member task force. The person who sold the drugs was identified and arrested. Task force officers pointed their guns at some of the citizens inside the club, including some of the plaintiffs, searched the cash register and door receipts, and confiscated currency from the door receipts. People in the club were not allowed to leave or go to the restroom for the next sixty to ninety minutes while the task force occupied the establishment. Only two people were found to be involved in narcotics and arrested, the person who sold the narcotics to the undercover officer and that person's brother, who had some of the marked money from the sale in his pocket. Pet. App.4a-6a; 5 F.3d at 1440.

A second raid took place a little over three months later, again authorized by the Chambers County Sheriff. It was on March 29, 1991, and started again with an undercover purchase of drugs in the club, followed by a similar raid which, again, lasted sixty to ninety minutes with little respite for those inside. During the raid, task force members chambered rounds of ammunition in their guns and pointed the guns at citizens in the club, ordering them to the floor. A shotgun was pointed at the face of one of the plaintiffs by an officer whose hand was on the trigger. Another plaintiff was held at gunpoint much of the time. Some of the citizens were searched, including one of the plaintiffs, who was pushed outside the club, grabbed, shoved against a wall, and searched. Another citizen was pushed off a bar stool. No one was arrested during this second raid. Pet. App. 6a; 5 F.3d at 1440.

During one of the raids, at least one officer said they would keep coming back until the club was closed. No other law enforcement operation of this kind had been conducted in the

twenty-one year tenure of the Sheriff of Chambers County. Pet. App. 7a; 5 F.3d at 1440.

As a result of the raids, the plaintiffs filed their complaint in the district court and included claims under 42 U.S.C. § 1983. Jurisdiction to hear the federal claims existed under 28 U.S.C. § 1331 and § 1343. The defendants were the Chambers County Commission, the Chambers County Sheriff's Department, Chambers County Sheriff James C. Morgan (officially and individually), the City of Wadley, Alabama (whose officers and chief were involved in the raid), Wadley Police Chief Freddie Morgan (officially and individually), and Officer Gregory Dendinger (officially and individually). Motions to dismiss were granted in part and denied in part, and are not at issue here. Motions for summary judgment also were granted in part and denied in part, including a motion for summary judgment by the Chambers County Commission, which was denied. Pet. App. 1a-2a; 5 F.3d at 1439, 1441.

Because some of the denials of summary judgment involved issues of qualified immunity, some of the defendants appealed pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The Chambers County Commission was one of those who appealed and, even though its claim did not involve qualified immunity, the Eleventh Circuit reviewed the County Commission's appeal, along with the appeals of some of the other defendants, under what the Court called its discretionary "pendent appellate jurisdiction." Pet. App. 30a-31a; 5 F.3d at 1449-1450. The County Commission contended that it cannot be liable for the actions of the Sheriff because he is not a final policymaker for the County in the area of law enforcement. The Eleventh Circuit agreed and reversed, holding that summary judgment should be granted in the County Commission's favor.

In its opinion, dated November 3, 1993, the Eleventh

Circuit took note of the case law holding that a county is liable for the actions of those who are final policymaking officials in the relevant area of the county's business. The Court stated that, under Alabama law, a sheriff is considered an officer of the state and not an employee of the county, but added that this fact is not at all dispositive. To the contrary, said the Court, in some areas of his or her responsibility, an Alabama sheriff can be considered a final county policymaker under § 1983 notwithstanding the sheriff's technical label as a state official. Pet. App. 32a-33a; 5 F.3d at 1450, *citing, Parker v. Williams*, 862 F.2d 1471, 1478-1479 (11th Cir. 1989).

However, the Court went on to say that law enforcement is not one of those areas and that Alabama sheriffs are not final county policymakers in the realm of law enforcement. The Court referred to the previous opinion of another Eleventh Circuit panel in *Parker v. Williams*, which held that sheriffs exercise final county authority in hiring jailers. Quoting *Parker*, the Court said, "Alabama counties and their sheriffs maintain their county jails in partnership." Pet. App. 33a, 5 F.3d at 1450, quoting 862 F.2d at 1478-1479. Taking this "partnership" as an absolute criterion, the Eleventh Circuit in the present case said, "unlike the jail function identified in *Parker v. Williams*, there is no law enforcement 'partnership' between Alabama counties and their sheriffs." Pet. App. 34a; 5 F.3d at 1451.

To illustrate the point, the Eleventh Circuit quoted the Alabama statute stating that it is "the duty of sheriffs in their respective counties . . . to ferret out crime, to apprehend and arrest criminals and . . . to secure evidence of crimes in their counties," pet. app. 33a, 5 F.3d at 1450, quoting Ala. Code § 36-22-3(4), and then added that "no similar law enforcement duty or authority has been bestowed upon the County itself." Pet. App. 33a; 5 F.3d at 1450.

In the absence of some explicit authorization of substantive law enforcement responsibility upon the counties independent of that given the sheriff, the Eleventh Circuit said there was no liability:

> Because Alabama counties are "authorized to do only those things permitted or directed by the legislature of Alabama," *Lockridge v. Etowah County Comm'n*, 460 So.2d 1361, 1363 (Ala. Civ. App. 1984), and because the State has not assigned the counties any law enforcement authority, the sheriff is not exercising county power when he authorizes a raid on suspected criminal activity within his county. . . . We hold that Sheriff Morgan is not the final repository of Chambers County's general law enforcement authority, because it has none. Therefore, the County Commission is not liable for the Sheriff's law enforcement actions under 42 U.S.C. § 1983, and it is entitled to summary judgment on the § 1983 claims.

Pet. App. 33a-34a, 5 F.3d at 1451.

On January 18, 1994, the Eleventh Circuit issued a decision modifying its earlier opinion with respect to one of the individual defendants on an issue that is not relevant here. Pet. App. 41a; 11 F.3d 1030. The petition for a writ of certiorari was then filed in this case, raising the county liability issue, and was granted. A cross-petition by Sheriff Morgan regarding his personal liability was docketed and remains pending. *Morgan v. Swint*, No. 93-1638 (Pet. for Cert. filed 4-18-94).

SUMMARY OF ARGUMENT

In a series of decisions from *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), to *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), to *City of St. Louis v. Prapotnik*, 485 U.S. 112 (1988), to *Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989), this Court repeatedly has held that local governmental liability exists under 42 U.S.C. § 1983 for the actions of those officials who are responsible for establishing final policy with respect to the subject matter in question. In *Jett*, a majority of the Court adopted the reasoning of the plurality opinion in *Prapotnik*, which in turn had relied heavily upon the plurality opinion in *Pembaur*.

Indeed, this Court's decision in *Pembaur* requires reversal in the present case. A majority of the Court in *Pembaur* held that both the county sheriff and the county prosecutor in Hamilton County, Ohio were acting as final county policymakers with respect to their involvement in an unconstitutional raid on a physician's office. The majority's conclusion that the sheriff was acting as a county policymaker relied explicitly upon the Sixth Circuit's conclusion to that effect in the same case, which in turn was based upon the fact that, under Ohio law, sheriffs are elected by the residents of their respective counties, with their offices, expenses, and salaries funded the counties. The law is the same in Alabama as in Ohio in this respect, and there is nothing of relevance to distinguish the Alabama sheriff from the Ohio sheriff in *Pembaur*. In addition, the plurality opinion in *Pembaur*, when discussing how officials can be final county policymakers in some areas and not others, reflected the common understanding of sheriffs as local policymakers when it stated that "decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to [local governmental] liability." 475 U.S. at 483 n. 12.

The only conceivable distinction between Alabama and Ohio is that sheriffs in Alabama have been labeled state officials under Alabama law, but the Eleventh Circuit in the present case correctly said that this point is not dispositive. If

it were, states could completely insulate their local governments from § 1983 liability simply by labeling all final policymakers as state officials. The case law from this Court makes it clear that the federal interest encompassed by § 1983 cannot be defeated by that sort of evasive action.

In its decision in this case, the Eleventh Circuit never disputed the fact that the sheriff has final law enforcement authority within the county, but simply held that it is not the county's policy that the sheriff sets. However, the Eleventh Circuit never identified whose policy it is if not the county's. Because the sheriff does not, under color of law, set policy for himself or herself, the only other possibility is that the sheriff sets policy for the state.

However, that cannot be the case. The long-time understanding of the office of sheriff, in Alabama and elsewhere, is that the sheriff is a county official who sets policy for the county, not for the state. The sheriff is elected by the voters of the county, wielding power and setting policy only within the county, not outside it. Indeed, the sheriff no more sets law enforcement policy for the state than the county commission sets legislative policy for the state. In Alabama, state law enforcement policy is set by the Alabama Department of Public Safety, which includes the Alabama Highway Patrol and the Alabama Bureau of Investigation. The sheriff is not part of this statewide command and policymaking structure and need not answer to it, nor to any other state official, thus confirming his or her status as a county policymaker rather than a state policymaker.

According to the Eleventh Circuit's analysis in this case, county officials other than the sheriff must be involved with the sheriff in a substantive law enforcement "partnership" before the sheriff can be considered a final county policymaker.

However, that approach conflicts with the final policymaker doctrine as developed by this Court inasmuch as the presence of a "partnership" with other county-based officials is not a prerequisite to exercising final policymaking authority. To the contrary, the fact that a particular official possesses sole and ultimate authority corroborates the finality of his or her policymaking power. Even if some sort of "partnership" were a prerequisite, that would be met in this case by the fact that other county officials are responsible for financing the sheriff's law enforcement apparatus and paying his or her salary.

If the Eleventh Circuit's analysis were to prevail, local governments would not be liable for the actions of many high-ranking elected and appointed executive officials because those who possess ultimate authority rarely possess it in "partnership" with other officials, except to the extent that the local governmental treasury funds their offices. As a result, much, and perhaps most, local governmental liability under § 1983 would be eliminated, thus defeating the intent of Congress in creating damage remedies against local governments.

ARGUMENT

I. LOCAL GOVERNMENTS ARE LIABLE FOR THE UNCONSTITUTIONAL ACTIONS OF THOSE WITH FINAL POLICYMAKING AUTHORITY.

In 1978, this Court overruled its decision of 17 years earlier in *Monroe v. Pape*, 365 U.S. 167 (1961), and held that local governmental bodies can be sued under 42 U.S.C. § 1983. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). The Court in *Monell* analyzed the origins of the Civil Rights Act of 1871, § 1 of which is now codified as § 1983, concluding that § 1 "was intended to provide a remedy, to be broadly construed, against all forms of official violation of

federally protected rights." Id. at 700-701. According to the Court, the Congress intended this remedy to be available not only against individuals but against local governments as well. Id. at 685-685, 690. At the same time, the Court made it clear that § 1983 liability cannot be predicated upon a theory of *respondeat superior*, but only upon unlawful actions by a local government's "lawmakers or by those whose edicts or acts may fairly be said to represent official policy." Id. at 694.

Eight years later, the Court elaborated upon this standard in *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), in which the majority held that a county in Ohio was liable for the actions of the county sheriff and the county prosecutor in precipitating an unconstitutional law enforcement raid on the office of a physician. Justice Brennan's plurality opinion stated that liability exists for the actions of "officials responsible for establishing final policy with respect to the subject matter in question," and that the question of final policymaking authority "is a question of state law." Id. at 483. The majority held that both the sheriff and the prosecutor were responsible for establishing final policy in the area of law enforcement. Id. at 484-485.

Two years later, Justice O'Connor's plurality opinion in *City of St. Louis v. Prapotnik*, 485 U.S. 112 (1988), discussed the issue further, drawing heavily upon the plurality opinion in *Pembaur* and concluding that "[local governmental] officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability." Id. at 123. The *Prapotnik* plurality reiterated that the analysis of whether an official has final policymaking authority is dependent upon state law, custom, and usage. Id. at 123, 127. In addition, the plurality concluded that the question of whether a particular official has final policymaking authority should be decided by the trial judge, not the jury. Id. at 126, 131.

One year later, a majority of the Court in *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 736-738 (1989), adopted the reasoning of Justice O'Connor's plurality opinion in *Prapotnik* with respect to the final policymaker issue, noting that the opinion was based upon the teachings of prior cases, including *Pembaur*. The Court in *Jett* then remanded the case for further findings pursuant to the principles set out by the *Prapotnik* plurality.

In light of all of this, it is clear that local governmental liability under § 1983 exists for the actions of final policymakers. The analysis of the final policymaker issue in specific cases must be informed by the Court's holding in *Prapotnik* and Justice O'Connor's plurality opinion, as well as the Court's holding in *Pembaur* and Justice Brennan's plurality opinion, upon which Justice O'Connor's opinion in *Prapotnik* is based. In addition, any analysis must be mindful of the fact, as this Court noted in *Monell*, that § 1983 was passed in order "to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." 436 U.S. at 700-701.

II. THIS COURT'S DECISION IN *PEMBAUR v. CINCINNATI*, REQUIRES REVERSAL IN THE PRESENT CASE.

As noted in the previous section of this brief, a majority of this Court in *Pembaur* held that both the County Prosecutor and the County Sheriff of Hamilton County, Ohio, acted as final policymakers for the county in the area of law enforcement, including their involvement in an unlawful raid on a physician's office. 475 U.S. at 476, 484-485. In addition, while explaining that officials can be final policymakers in some areas and not others, the plurality opinion noted that a sheriff generally is a final county policymaker in the area of law enforcement:

> [F]or example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, *although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability.*

Id. at 483, n. 12 (emphasis added).

In holding that both the sheriff and the prosecutor exercised final county power, the *Pembaur* majority explicitly relied upon the conclusion of the Sixth Circuit Court of Appeals to that effect in the same case. 475 U.S. at 484. The Sixth Circuit stated that, under Ohio law, sheriffs are elected by the residents of each county, serve as the chief law enforcement officers in their respective counties, receive their offices, books, furniture, and other materials from the counties, and receive their salary and training expenses from the counties. Because of these factors, the Sixth Circuit held that the sheriff is a final policymaker for the county with respect to the law enforcement activities at issue, and added that the prosecutor also is a final county policymaker. *Pembaur v. Cincinnati*, 746 F.2d 337, 341 and n. 3 (6th Cir. 1984). This Court specifically affirmed on those points. 475 U.S. at 484.

This Court's holding in *Pembaur* is controlling in the present case. Under Alabama law, as in Ohio, sheriffs are elected by the residents of their respective counties, receive their offices, books, furniture, and other materials from their respective counties, and receive their salary and expenses from their respective counties. Ala. Const. Art. V, § 138; Ala. Code §§ 36-22-3, 36-22-5, 36-22-16, 36-22-18. They serve as the chief law enforcement officers in the counties inasmuch as

their decisions are final and unreviewable within their counties and state law confers on them the duty to enforce the law "in their respective counties." Ala. Code § 36-22-3(4). Thus, there is nothing of relevance to distinguish the Alabama sheriff from the Ohio sheriff in *Pembaur*.

The only conceivable distinction is that sheriffs are labeled as state officials under Alabama law, but the Eleventh Circuit in the present case made it clear that this point is not dispositive. Nor could it be. As Justice O'Connor observed in *St. Louis v. Prapotnik*, "if . . . a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, § 1983 could not serve its useful purpose." 485 U.S. at 126. Similarly, if states could insulate their counties from liability simply by labeling sheriffs and others who operate on the local level as "state officials," § 1983 would easily be thwarted. For example, states could completely immunize their local governments by labeling all final policymakers as state officials -- sheriffs, circuit clerks, county prosecutors, county executives, county commissioners, city police chiefs, city mayors, city council members, school superintendents, school board members, and on and on.

If that were the case, local governmental liability could be wiped out completely, and the intent of the 1871 Congress to hold local governments responsible -- as detailed in *Monell* -- would be derailed. Fortunately, that is not the state of the law. As the Fifth Circuit noted several years ago, even where an elected official operating on the local level is labeled a state official under state law, county liability still exists because "county responsibility for violation of the Constitution cannot be evaded by such ingenious arrangments." *Crane v. Texas*, 766 F.2d 193, 195 (5th Cir.), *cert. denied*, 474 U.S. 1020 (1985). And as this Court held in *Felder v. Casey*, 487 U.S. 131

(1988), "a state law that immunizes government conduct otherwise subject to suit under § 1983 is pre-empted. . . because the application of the state immunity law would thwart the congressional remedy." *Id.* at 139, *citing, Martinez v. California*, 444 U.S. 277, 284 (1980).

Moreover, even if a state's label were controlling, Alabama law does not specify that the sheriff sets law enforcement policy for the state as opposed to the county, or that the sheriff is not a final county policymaker in the area of law enforcement. The only reference to the sheriff's label as a state official comes in the Alabama Supreme Court's opinion in *Parker v. Amerson*, 519 So.2d 442 (Ala. 1987), which said that a sheriff is considered an officer of the state "and not an employee of a county for purposes of imposing liability on the county under a theory of respondeat superior," and that it has been this way since 1901. *Id.* at 442, *quoted in*, Pet. App. 32a, 5 F.3d at 1450. Obviously, a state can structure its state law respondeat superior liabilities and immunities any way it chooses, but that does not mean the sheriff makes law enforcement policy for the state rather than the county. Indeed, Alabama law and the Alabama courts frequently have expressed the common understanding of the sheriff as a county-based official setting policy for the county. *See, e.g., First Mercury Syndicate v. Franklin*, 623 So.2d 1075, 1075 (Ala. 1993) (county purchases professional liability insurance for the sheriff); *Jefferson County v. Dockerty*, 30 So.2d 474, 477 (Ala. 1974) ("the sheriff of Jefferson County is undoubtedly a county officer"); *In re County Officers*, 143 So. 345 (Ala. 1932) (sheriffs are "strictly speaking, county officers" for purposes of 1912 constitutional amendment regarding salaries); *State ex rel. Martin v. Pratt*, 68 So. 255, 257 (Ala. 1915) ("a sheriff [is] the highest purely executive officer of a county").

Rather than basing its decision in this case on any label of

the Alabama sheriff as a state official, the Eleventh Circuit said that counties in Alabama have been given no explicit law enforcement authority by state statute independent of that given the sheriffs. Pet. App. 33a; 5 F.3d at 1450. While the Eleventh Circuit noted that state law bestows law enforcement authority upon sheriffs "in their respective counties," id:, quoting Ala. Code § 36-22-3(4), the court relied upon its assessment "that no similar law enforcement duty or authority has been bestowed upon the County itself." Id. However, neither the ruling of this Court nor that of the Sixth Circuit in *Pembaur* was based upon any express delegation of substantive law enforcement authority to Ohio counties independent of that to the sheriffs. It is not as if county governing boards in Ohio have independent law enforcement authority, or directly supervise the law enforcement activities of their sheriffs, or ride around with the sheriffs in the patrol cars.

In Alabama, as in Ohio and many other states, county officials other than the sheriff do have law enforcement responsibilities in the sense that the county actually pays for the office, the operating expenses, and the salary of the sheriff. Therefore, the sheriff's law enforcement apparatus is clearly a county operation with county support. The fact that no county officials outside the sheriff's department actually go out and investigate crimes, arrest people, and execute searches and raids does not in any way preclude county liability, just as it did not preclude liability in *Pembaur*.

One more point should be made as part of this discussion: Both *Pembaur* and *Prapotnik* state that the final policymaker issue is to be guided by state law (which includes custom and usage). However, state statutes -- whether in Alabama, Ohio, or elsewhere -- do not employ the terminology of § 1983 jurisprudence and do not specify whether particular officials are "final county policymakers" for the purposes of applying §

1983. Similarly, they do not state in specific terminology whether a sheriff or other official sets "county policy" or "state policy." Thus, federal courts must examine the actual structures of local government and the relationships of officials, as set out by state law, and determine, in light of the goals of § 1983, whether particular officials are "final policymakers" for local governments as that term has been developed from *Monell* and articulated in *Pembaur*, *Prapotnik*, and *Jett*. As Justice O'Connor's opinion stated in *Prapotnik*:

> We are not, of course, predicting that state law will always speak with perfect clarity. We have no reason to suppose, however, that federal courts will face greater difficulties here than those that they routinely address in other contexts.

485 U.S. at 125-126.

Thus, while the actual operation of local government is a question of state law (as well as custom and usage), the question remains -- once the relevant principles of state law have been established -- whether those state law principles add up to "final policymaker" status as a matter of federal law. If the relevant principles in Ohio lead this Court to conclude, as it did in *Pembaur*, that particular officials are final county policymakers for purposes of § 1983, then the existence of those same principles in other states, such as Alabama, require that similar officials in those states also be considered final county policymakers. Accordingly, the challenge in this case is not so much to the Eleventh Circuit's construction of state law, but to its conclusion that this construction precludes county liability under federal law. With respect to that issue, this Court's holding in *Pembaur* is controlling, and the Eleventh Circuit's decision is plainly in error.

In summary, the key factors are these: In Alabama, as in Ohio, sheriffs are elected by the voters of their respective counties and have final and unreviewable law enforcement authority which is exercised only within their respective counties, financed and supported by the county treasury. Thus, counties in both states, as in many other states, truly do have law enforcement authority, which is exercised in a final and unreviewable manner by the sheriff. On the relevant factors, then, there is little to distinguish Alabama from Ohio, and this Court's decision in *Pembaur* requires reversal in the present case.

III. WHETHER IN ALABAMA OR ELSEWHERE, SHERIFFS WITH FINAL POLICYMAKING AUTHORITY EXERCISE IT WITH RESPECT TO THEIR COUNTIES, NOT THEIR STATES.

In its ruling in this case, the Eleventh Circuit never disputed the fact that the law enforcement policy set by a sheriff in Alabama within his or her county is final and unreviewable. Instead, the Court said it is not the county's policy that the sheriff sets. But the Court never identified whose policy it is. Certainly, it is not simply the personal policy of the sheriff, owned only by him or her, and it is not some policy set in a vacuum, without a home.

The only alternative would be to assume that the sheriff sets policy for the state. Apparently, that is what the Eleventh Circuit has done, although it never said so.

However, that simply cannot be the case. In the traditional county model, which still remains in most states, including Alabama, sheriffs are elected officials, chosen by the county's voters. They have final law enforcement authority, but that authority does not extend beyond the confines of the county.

Within the county, the sheriff is the chief law enforcement officer, and his or her policymaking authority is unreviewable. But outside of the county, the sheriff has no authority -- final or otherwise -- and the statewide law enforcement authority belongs to the state police or similar agencies.

Thus, sheriffs traditionally have been considered county policymakers and the chief law enforcement officers not for their states, but for their counties. Indeed, the word "sheriff" is derived from the Saxon word "scyre," meaning shire or county, and "reve," meaning keeper. Walter H. Anderson, *A Treatise on the Law of Sheriffs, Coroners, and Constables*, at 5 (Dennis and Co, Inc., 1941).

Treatises and books regarding law enforcement uniformly describe the position of sheriff in the United States as a position with county authority:

> The principal county police position is that of sheriff, perhaps the oldest law-enforcement office in Anglo-American history. . . . The sheriff has broad powers covering the entire spectrum of criminal justice, including detection and apprehension of offenders, administration of county jails [and] execution of court orders. . . .

George Thomas Kurian, *World Encylopedia of Police Forces and Penal Systems*, at 430 (Facts on File, 1989). "The sheriff's department is one of the major components of county government. The sheriff is the principal police official within a county . . : ." John A. Humphrey and Michael E. Milakovich, *The Administration of Justice: Law Enforcement, Courts, and Corrections*, at 102 (Human Science Press, 1981). "Throughout U.S. history, the sheriff has remained the principal law enforcement officer in the county." George T. Felkenes, *The Criminal Justice System: Its Functions and Personnel*, at 53

(Prentice-Hall, 1973). "The most universal of all the county officers is the sheriff; he is found in every one of the 3,050 counties in the United States . . . ." Paul Wager, *County Government Across the Nation*, at 15 (University of North Carolina Press, 1950).

By contrast, statewide law enforcement authority is exercised in nearly all of the states by the state police. Kurian, at 429-430. In some few counties or states, law enforcement authority has been taken away from sheriffs and given to the state police in an effort to streamline law enforcement operations and eliminate duplication. Wager, at 15, 120, 138, 197; G. Bennett-Sandler, Robert L. Frazier, Donald A. Torres, Ronald J. Waldron, *Law Enforcement and Criminal Justice*, at 53 (Houghton Mifflin Co., 1979). In those jurisdictions, the sheriff obviously is not a policymaker -- and certainly not a final policymaker -- in the area of law enforcement. Instead, the policymakers are those from the state police, who might well be considered to be carrying out state policy, particularly if their salaries and expenses are paid by the state and if their actions are coordinated and reviewed by central headquarters in the state capitol. For example, in such a jurisdiction, if each county had its own state police office, but the director of each county office was paid by the state and supervised by state headquarters, a strong argument could be made that the director's policymaking power was not final and was exercised on behalf of the state and not the county.

But in the more typical situation, where the sheriff has full law enforcement authority within the county and the statewide law enforcement responsibility belongs to the state police, it is totally wrong to suggest that the sheriff sets policy for the state. Certainly, the county commission of a given county does not set legislative policy for the state -- the state legislature does. The county executive does not set executive policy

for the state -- the Governor does. And the sheriff does not set law enforcement policy for the state -- the director of the state police does.

This is highlighted by the fact that sheriffs in most states, including Alabama, are elected by the voters of the county. It would be quite absurd to say that sheriffs set policy for the state when they derive their legitimacy and authority only from the voters of one county within the state and when their regular duties are limited to that county.

The understanding of the sheriff as a county policymaker is reflected in the language commonly used to describe sheriffs. For example, the sheriff involved in *Pembaur* is known as the "Sheriff of Hamilton County," not the "Sheriff of Ohio," and the sheriff involved in the present case is known as "the Sheriff of Chambers County," not the "Sheriff of Alabama." The plurality opinion in *Pembaur* reflected this common understanding of sheriffs as county law enforcement officers, stating that "decisions with respect to law enforcement policies, over which the sheriff *is* the official policymaker, *would* give rise to [county] liability." 475 U.S. at 483 n.12 (emphasis in original).

Alabama has chosen the traditional and typical model, leaving final and unreviewable law enforcement authority for each county in the hands of that county's sheriff, elected by its voters and financed by its treasury. Each sheriff serves only one county and has no law enforcement power outside the county. Thus, it is clear that sheriffs in Alabama make law enforcement policy, and they make *final* policy, but they only make it for their respective counties. Therefore, their policy is county policy.

By contrast, Alabama has vested the authority for state law enforcement policy in the Alabama Department of Public

Safety, which includes the Alabama Highway Patrol and the Alabama Bureau of Investigation. Ala. Code, §§ 32-2-1, 32-2-3, 32-2-4, 32-2-20, 32-2-22. *See also*, Executive Order Number Fifty-Five of Governor George C. Wallace, October 15, 1974 (providing for the creation of the Alabama Bureau of Investigation within the Department of Public Safety); Ala. Code, §§ 15-10-90, 15-10-91 (referring to the state bureau of investigation). Certainly, the Director of the Department of Public Safety can be said to be a policymaker for the state, and likely a final one. Similarly, the directors of the Alabama Highway Patrol and the Alabama Bureau of Investigation can be considered state policymakers, and perhaps final ones. Their subordinates likely can be considered state policymakers, although they may not be final policymakers.

However, the sheriffs of the individual counties in Alabama do not serve in this statewide chain of command and are not part of this state policymaking structure. Instead, they exercise power in their own counties, supported by county funds, answerable to no one but the counties' voters. Clearly, sheriffs in Alabama exercise final policymaking authority, not for the state, but for the county.

As noted previously in Section II of this brief, the fact that sheriffs technically have been labeled state officials under Alabama law was not considered dispositive by the Eleventh Circuit and should make no difference to this Court.

Also, it makes no difference that sheriffs in Alabama and many states spend much of their time enforcing *state* law as opposed to county ordinances. The Eleventh Circuit never raised or relied upon that point, and none of the decisions of this Court have held that a final policymaker acts for a local government only if he or she enforces that government's legislative ordinances. For example, in *Pembaur*, the county

officials were attempting to enforce grand jury subpoenas growing out of an investigation of a physician for defrauding state welfare agencies in violation of state law. 475 U.S. at 471-472. Even though the sheriff and prosecutor were enforcing state law rather than any county ordinance, this Court held that they were final county policymakers. Id. at 484. This is in recognition of the fact that it was not the state statute that was unconstitutional, but the means of enforcement employed by the county's policymakers.

If the rule were otherwise, local governments would rarely be liable for unconstitutional law enforcement practices, since the vast majority of actions by county sheriffs and city police chiefs are undertaken as part of the enforcement of state statutes. (Indeed, many counties have no county ordinances). The problem would extend to other areas as well -- school boards and school superintendents often enforce state educational laws and regulations, autonomous civil service commissions often enforce state civil service laws, mayors and city councils often enforce state statutes relating to municipalities. However, as demonstrated by *Pembaur*, enforcement of local ordinances is not a prerequisite to local liability. If final policymakers on the local level act unconstitutionally in enforcing valid state statutes, local governments are liable.

IV. THE ELEVENTH CIRCUIT'S "PARTNERSHIP" CRITERION IS INCONSISTENT WITH THIS COURT'S DECISIONS REGARDING THE FINAL POLICYMAKER DOCTRINE.

Section II of this brief discussed how the Eleventh Circuit's holding is contrary to the result reached by this Court in *Pembaur*. In addition, the means used by the Eleventh Circuit to reach its holding -- the "partnership" criterion -- conflicts

with this Court's articulation of the final policymaker doctrine in *Pembaur* and *Prapotnik*.

In its opinion, the Eleventh Circuit referred to the prior holding of another Eleventh Circuit panel in *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989), to the effect that counties in Alabama are liable under § 1983 for the actions of their sheriffs regarding the jails in each county. In the present case, the Court quoted *Parker*'s statement that "Alabama counties and their sheriffs maintain their county jails in partnership." Pet. App. 33a, 5 F.3d at 1450, quoting 862 F.2d at 1478-1479. The court then went on to contrast the present case with *Parker* by saying that "there is no law enforcement 'partnership' between Alabama counties and their sheriffs." Pet. App. 34a; 5 F.3d at 1451. Accordingly, said the Court, Alabama counties have no law enforcement policy and sheriffs are not final county policymaking officials in the law enforcement arena.

This "partnership" criterion is out of keeping with the whole concept of a final policymaker as expressed in *Pembaur*, *Prapotnik*, and *Jett*. In essence, the Eleventh Circuit has required that some county official or body other than the sheriff share substantive law enforcement power with the sheriff before liability attaches. However, as stated by Justice O'Connor's opinion in *Prapotnik*, "only those [local governmental] officials who have '*final* policymaking authority' may by their actions subject the government to § 1983 liability." 485 U.S. at 123 (emphasis added), quoting *Pembaur*, 475 U.S. at 483. While it is certainly true that policymakers can share final authority in partnership -- see, *Pembaur*, 475 U.S. at 484 (county sheriff and prosecutor were both final policymakers for law enforcement under certain circumstances); *Prapotnik*, 485 U.S. at 126 ("there will be cases in which policymaking responsibility is shared among more than one official or body") -- that sort of sharing is not required for an official to be a final

policymaker. To the contrary, the fact that ultimate authority in a particular area may reside in a single individual confirms that the individual's policymaking power is truly final and unreviewable.

The Eleventh Circuit's entire analysis of Alabama law was focused on this "partnership" inquiry. Indeed, the only specifics of Alabama law that the Court mentioned were, first, that sheriffs are technically consider state officals, pet. app. 32a-33a, 5 F.3d at 1450, second, that no statutory law enforcement authority "similar" to that of the sheriff "has been bestowed upon the County itself," pet. app. 33a, 5 F.3d at 1450, and, third, that Alabama counties are authorized to do only those things permitted or directed by the legislature. Pet. App. 33a, 5 F.3d at 1450-1451. As noted previously, the first point is not considered dispositive by the Eleventh Circuit, nor could it be. As for the third, counties in every state are merely creatures of the state, and in most states are limited to those powers permitted by state law. Dallas C. Sands & Michael E. Libonati, *Local Government Law*, §§ 3.01, 8.01 (Callaghan & Co., 1981). The second point is simply another way of expressing the "partnership" requirement -- that county liability is predicated not upon the sheriff having sole and final law enforcement authority, but upon some other county official or body having what the Eleventh Circuit called "similar" authority.

However, this Court's decisions require only a showing of *final* policymaking authority in the venture at issue, not shared policymaking authority. Accordingly, the Eleventh Circuit's analysis is in error.

Finally, even if some sort of "partnership" with other county officials were required to demonstrate county liability, surely it would not have to be some sort of sharing of the actual law enforcement operational duties -- with other county

officials given the power to actually participate in arresting people and investigating crimes. Instead, it would seem that any "partnership" requirement certainly could be satisfied by the fact that, in Alabama, county officials and the county treasury are responsible for providing the sheriff's office and equiptment, funding the sheriff's law enforcement operation, and paying the sheriff's salary. The sufficiency of this sort of link is clear from this Court's decision in *Pembaur* (as discussed in Section II of this brief), in which these very factors -- along with the fact that the sheriff was elected by the county's voters -- established county liability.

V. THE ELEVENTH CIRCUIT'S ANALYSIS WOULD DRASTICALLY LIMIT AND PERHAPS ELIMINATE ALL LOCAL GOVERNMENTAL LIABILITY FOR THE UNCONSTITUTIONAL ACTIONS OF HIGH-RANKING ELECTED OFFICIALS AND SOME HIGH-RANKING APPOINTED OFFICIALS IN THE EXECUTIVE BRANCH OF LOCAL GOVERNMENT, AND WOULD REQUIRE THE LOWER COURTS TO TAKE AN ENTIRELY NEW APPROACH FROM THAT WHICH MOST HAVE TAKEN.

Under the Eleventh Circuit's analysis, local governments are only liable for the actions of their officials if those officials share final power in "partnership" with other officials or bodies in the local government. However, most elected officials in the executive branch of local government share final power with no one, but instead are the sole and ultimate arbiters with respect to the functions of their particular office.

For example, on the county level in Alabama, these elected officials include the county coroner, Ala. Code § 11-5-4, the county treasurer, § 11-4-23, the circuit clerk for each

county, § 12-17-93, the county tax collector, § 40-5-1, and the county tax assessor. § 40-7-1. See also Ala. Code § 17-2-1. On the municipal level in most cities in the nation, these include, at a minimum, the mayor. The Eleventh Circuit's analysis would also cover high-ranking appointed officials -- such as city police chiefs -- so long as their power was final and not shared with others in government.

If the Eleventh Circuit's view were to prevail, local governments would not be liable for the unconstitutional actions of these officials because the officials do not share final power in "partnership" with others. This would eliminate much, and perhaps most, of the local governmental liability under § 1983, thereby contravening the mandate of the 1871 Congress that local governments be held responsible, in the words of *Monell*, for the actions of "those whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694. This would defeat the intent of Congress, which promulgated § 1983 and left it in place these 123 years as a vital mechanism in the enforcement of the Constitution for the people of this nation.

In addition, the Eleventh Circuit's analysis is directly contrary to the analysis employed by most of the lower courts, and if the Eleventh Circuit's view prevailed, an entirely new approach would be required among the lower courts. Those courts, for the most part, have not required that there be some sort of substantive "partnership" with other county officials before a final policymaker can be held liable, and most have held, instead, that a county is liable for the sheriff's actions, particularly in the area of law enforcement. *See, e.g., Turner v. Upton County*, 915 F.2d 133, 136-137 (5th Cir. 1990); *Crowder v. Sinyard*, 884 F.2d 804, 828 (5th Cir. 1989); *Blackburn v. Snow*, 771 F.2d 556, 571 (1st Cir. 1985); *Marchese v. Lucas*, 758 F.2d 181, 188-189 (6th Cir. 1985); *Davis v. Mason County*,

927 F.2d 1473, 1480-1481 (9th Cir. 1991). *But see, Soderbeck v. Burnett County*, 752 F.2d 285 (7th Cir. 1987) (no county liability where plaintiff "made no effort to show that the sheriff is a policy-making official of county government"), 821 F.2d 446, 452 (7th Cir. 1987) (reaffirming earlier decision).

In light of all of this, the Eleventh Circuit's "partnership" approach is inconsistent with the purpose and role of local governmental liability under § 1983, as well as the statute's general interpretation by the courts.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the decision of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully Submitted,

ROBERT B. McDUFF*
771 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

CARLOS A. WILLIAMS
Post Office Box 306
Mobile, Alabama 36601
(205) 434-2478

BRYAN STEVENSON
BERNARD HARCOURT
114 North Hull Street
Montgomery, Alabama 36104
(205) 269-1803

Counsel for Petitioners
* Counsel of Record

No. 93-1636

(8)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

TOM SWINT, TONY SPRADLEY, DRUCILLA JAMES and JEROME LEWIS,
Petitioners,

v.

CHAMBERS COUNTY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENT CHAMBERS COUNTY COMMISSION

PAUL M. SMITH *
BRUCE J. ENNIS
DONALD B. VERRILLI, JR.
THOMAS J. PERRELLI
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

JAMES W. WEBB
KENDRICK E. WEBB
BART HARMON
WEBB & ELEY, P.C.
166 Commerce Street
Suite 300
Post Office Box 238
Montgomery, Alabama 36101
(202) 262-1850
Counsel for Respondent

* Counsel of Record

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39 pp

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS

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BRIEF FOR RESPONDENT CHAMBERS COUNTY COMMISSION

STATEMENT

This is an action under 42 U.S.C. § 1983 in which petitioners seek to hold the governing body of an Alabama County, respondent Chambers County Commission, liable for allegedly unconstitutional actions taken by the sheriff in that county, James C. Morgan. The Eleventh Circuit ruled that the Sheriff could not, through his conduct, create "policies" attributable to the County under section 1983 because he is not a County official and the County is not authorized by state law to play any role in law enforcement.

The Place of Sheriffs in the Alabama Governmental Structure

Alabama, like all other states, has both a state government and county governments. Ala. Code § 11-1-1. Unlike in some states, however, Alabama counties do not have "home rule" powers and are restricted to performing relatively narrow functions expressly delegated to them by state law. These functions primarily involve construction and maintenance of the county road system, a county courthouse, and a county jail.[1] *See id.* §§ 11-3-10, 11-3-11, 11-14-10. There is no statute authorizing counties to engage in law enforcement.

The nature and functions of the office of sheriff in Alabama are also specified by state law. There is a sheriff in each county of the State, elected by the voters of that county. Ala. Const. art. V, § 138. Under the Alabama Constitution of 1901, sheriffs are specifically designated as *state* executive officials. *Id.* § 112 ("The executive department shall consist of a governor, lieutenant governor, attorney general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, *and a sheriff for each county.*") (emphasis added). As a result, they share the same sovereign immunity and Eleventh Amendment immunity accorded to other state officials. *Parker v. Williams*, 862 F.2d 1471, 1476 (11th Cir. 1989); *Parker v. Amerson*, 519 So. 2d 442, 446 (Ala. 1987).

Sheriffs in Alabama have three basic functions: (1) assisting the state judicial system by serving process and performing other related tasks, Ala. Code § 36-22-3(1), (2) operating the jail, *id.* § 14-6-1, and (3) enforcing state law in their county, *id.* § 36-22-3(4). With respect

[1] This Court recognized just two years ago that the "principal function" of county commissions in Alabama "is to supervise and control the maintenance, repair, and construction of county roads." *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 824 (1992) (citing Ala. Code §§ 11-3-1, -10).

to judicial functions, the sheriffs take orders from, and are supervised by, state judges when they are sitting in their counties.[2] With respect to jail operations, they receive general supervision from the Alabama Board of Corrections. *See id.* §§ 14-6-84, -85, -86, -90, -98. In the area of law enforcement, sheriffs are not supervised on a day-to-day basis, but they can be directed to perform criminal investigations and make reports about those investigations by the governor, the state attorney general, or the district attorney. *Id.* § 36-22-5.[3] Moreover, the governor is authorized to require sheriffs to provide "information in writing, under oath," concerning the conduct of their duties. Ala. Const. art. V, § 121.

The 1901 Constitution also specified that sheriffs may be removed from office for misconduct only through an original impeachment action in the Alabama Supreme Court, generally initiated by the state attorney general at the request of the governor. Ala. Const. art. VII, § 174. This was a change from the former system, under which sheriffs were impeached at the local level. Ala. Const. art. VII, § 3 (1875).[4] The change was made in order to tighten central control over sheriffs, in response to the perception that "the neglect of sheriffs" had led to an "excessive number of lynching cases in Alabama."

[2] The primary trial court in the Alabama judicial system is the circuit court. There are forty judicial circuits, some of which are limited to one county while others encompass multiple counties. The presiding judge of each circuit exercises "general supervision" over the sheriff or sheriffs in the circuit. Ala. Code § 12-17-24. Other judges may also direct the activities of sheriffs with respect to particular matters. *Id.* § 36-22-2(3).

[3] District attorneys, in turn, are state employees elected to perform prosecutorial functions for a given judicial circuit. Ala. Code § 12-17-180.

[4] A very similar provision, covering removal by county courts of various specified "county officers" and city officials, but *excluding* sheriffs, was retained in the 1901 Constitution. Ala. Const. art. VII, § 175.

Parker v. Amerson, 519 So. 2d 442, 443 (Ala. 1987). At that time, "the failure of county courts to punish sheriffs for neglect of duty and sheriffs' acquiescence in mob violence and ruthless vigilantism . . . led [the Governor] to believe that sheriffs must be held accountable to a higher and more central authority, the Supreme Court, and that this accountability would operate to guarantee the political rights of prisoners." *Id.* at 443-44; *see also id.* at 444 ("Sheriffs were made more accountable to the supreme executive power of the state, the Governor.").[5]

Alabama law gives county commissions *no* role in the development of policies governing local law enforcement or in the supervision of sheriffs in the performance of their law enforcement duties. *See* Pet. App. 33a-34a (citing *Lockridge v. Etowah County Comm'n*, 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984)). They do, however, have statutory obligations to provide funds and facilities to be used by sheriffs. *See* Ala. Code § 11-14-10 (duty to maintain a jail); *id.* § 36-22-16 (duty to pay a specified salary to sheriff); *id.* § 36-22-18 (duty to furnish sheriff with necessary quarters, supplies, and automobiles). If a county appropriates an unreasonably small amount of money for these purposes, a sheriff can sue the commission in state court for relief. *See Geneva County Comm'n v. Tice*, 578 So. 2d 1070 (Ala. 1991); *Etowah County Comm'n v. Hayes*, 569 So. 2d 397 (Ala. 1990).

The Facts of this Case

Petitioners have alleged that they were deprived of rights under the Fourth and Fourteenth Amendments during two law enforcement raids of a night club in Chambers County, Alabama, known as the Capri Club. These raids occurred after the Chambers County Sheriff's

[5] The 1901 Constitution also specified that it was an impeachable offense for a sheriff to make a false report to the Governor or to allow a prisoner in the county jail to be removed and killed or injured. Ala. Const. art. V, §§ 121, 138.

Department and the City of Wadley Police Department received numerous complaints concerning sale of illegal drugs at the club. The Sheriff's Department, the police departments of the cities of Wadley, Lafayette, Lanett, and Valley, and the Alabama Alcoholic Beverage Control Board participated in these raids.

In each instance, the raid occurred after an undercover officer had entered the Capri Club and purchased drugs with marked money. During the first raid, it is alleged that those present were not allowed to move or leave while the law enforcement officers conducted an extensive search. There were two arrests relating to the sale of drugs, some illegal liquor was seized, and several minors were found in the club as well. The second raid occurred three months later, after the Sheriff's Department received more complaints about drug dealing in the club. On this occasion, there were no arrests, and it is alleged that the officers abusively searched some individuals on the premises and threatened others with loaded guns.

Petitioners filed suit in federal court against the City of Wadley, the Chambers County Commission, and three individuals, Wadley Police Chief Freddie Morgan, Wadley Police Officer Gregory Dendinger, and Chambers County Sheriff James C. Morgan.[6] They sought declaratory, injunctive, and compensatory relief, alleging that these defendants had conducted illegal searches and seizures and had also deprived them of due process and equal protection of the laws.[7] On January 22, 1992, the district court

[6] These persons were sued in both their individual and official capacities. Also named originally was the Chambers County Sheriff's Department, but this defendant was dismissed because a sheriff's department is not a suable entity under Alabama law.

[7] In addition to section 1983, the complaint sought relief under 42 U.S.C. §§ 1981 and 1985(3). The section 1981 claims were dismissed in the district court. The section 1985(3) claims against respondent Chambers County Commission were treated in tandem

issued an order that, *inter alia,* dismissed the claims against Sheriff Morgan in his official capacity, to the extent that they involved a request for money damages, on the ground that he is a state official covered by the Eleventh Amendment.

The defendants then filed summary judgment motions. The individual defendants relied primarily on claims of qualified immunity. Respondent Chambers County Commission argued that it could not be held liable for the raids under 42 U.S.C. § 1983 because (1) it did not participate in the raids, (2) no county policy or custom was involved, and (3) Sheriff Morgan is a state official and is not authorized or empowered to set *county* policies on law enforcement through his own actions. *See* Pet. App. 55a.

The district court rejected the bulk of the qualified immunity claims raised by the individual defendants. Pet. App. 57a-62a. It also refused to grant summary judgment to the Chambers County Commission, concluding that "Sheriff Morgan, in his capacity as the chief law enforcement officer for the county, *may* have been the final policy maker for the County in making his decision to approve the allegedly illegal raids." *Id.* at 67a (emphasis added). Although acknowledging that the Sheriff "is a State of Alabama employee," the court was unwilling to rule out the possibility that he was also authorized to make decisions for the County in the area of law enforcement. *Id.* It noted three features of state law that might support such a conclusion: (1) the Sheriff was required to deputize participants in the raids who came

with the section 1983 claims in the court below, although the question presented in this Court is limited to section 1983.

Petitioners' complaint also included pendent state claims involving assault and false imprisonment (Count III) and negligence (Count IV). All state claims against the Chambers County Commission were, however, dismissed without opposition from petitioners in the district court because they had failed to file a claim initially with the County, as required by state law.

from outside the County, (2) the Sheriff is charged with ferreting out crimes and arresting criminals in a given county, and (3) the County Commission is required to furnish him with necessary equipment to be used for that purpose. *Id.*

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed in part and reversed in part.[8] With respect to the claims against the County Commission, the court of appeals held that the district court had erred in refusing to grant summary judgment. It noted, first, the basic principle set forth in *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978), that municipal liability under section 1983 may not be predicated on a theory of *respondeat superior* but may be based on the "acts of an official who 'possesses final authority to establish municipal policy with respect to the action ordered.'" Pet. App. 31a (quoting *Pembaur v. City of Cincinnati,* 475 U.S. 469, 481 (1986)). The court further stated that the relevant "policy or custom" need not have been adopted by the municipality's legislative body but may also have been created by an official who has final policymaking authority in a particular area of the municipality's business. Pet. App. 32a. It added that the question whether a given official has such authority is a matter of state law. *Id.*

In examining state law, the court of appeals noted that under Alabama law counties cannot be subjected to tort

[8] The three individual defendants had filed interlocutory appeals from the denial of their qualified immunity claims. *See Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985) (authorizing such appeals). The Chambers County Commission had filed a separate appeal from the denial of its motion for summary judgment, asking the court of appeals either to treat this denial as an appealable collateral order or to exercise discretionary pendent appellate jurisdiction over this issue. The Eleventh Circuit rejected the collateral order theory, Pet. App. 28a-30a, but agreed to exercise pendent jurisdiction, *id.* at 30a-31a.

The court of appeals ruled, with respect to the qualified immunity issue, that the individual defendants should have prevailed on the due process claim. Pet. App. 27a.

liability based on the actions of sheriffs, because the Alabama Constitution designates sheriffs as *state* executive officers. *Id.* (citing *Parker v. Amerson,* 519 So. 2d 442, 443 (Ala. 1987)). The court then considered the possibility that sheriffs, although part of state government, might still implement *county* policy in their law enforcement activities. *Id.* at 32a-33a. It discussed its own prior decision in *Parker v. Williams,* 862 F.2d 1471 (11th Cir. 1989), which held that Alabama counties and sheriffs operate county *jails* in "partnership" and that sheriffs accordingly can set county policy in that area.

The court of appeals concluded, however, that counties and sheriffs do not have a similar "partnership" in the area of law enforcement. Sheriffs are, by statute, duty-bound to " 'ferret out crime' " and to " ' apprehend and arrest criminals,' " Pet. App. 33a (quoting Ala. Code § 36-22-3(4) (1991)), but "no similar law enforcement duty or authority has been bestowed upon the County itself," *id.* To the contrary, the court held, a county commission would violate state law if it became involved in law enforcement. In sum, following three consistent prior decisions of federal *district* courts in Alabama, Pet. App. 34a (citing cases), the court of appeals concluded that "Sheriff Morgan is not the final repository of Chambers County's general law enforcement authority, because it has none." *Id.* Thus, the section 1983 claims could not be pursued against the County Commission.[9]

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[9] The court of appeals then held that the Sheriff's status under state law was also fatal to petitioners' claims under 42 U.S.C. § 1985(3). There was no evidence that the County Commission itself participated in a conspiracy within the meaning of that statute and the Sheriff's alleged participation did not itself create a county policy or custom causally related to the conspiracy. Pet. App. 34a-35a.

Sheriff Morgan filed a suggestion of rehearing *en banc,* and the panel responded by modifying its opinion to preclude petitioners from proceeding with their equal protection claim against Sheriff Morgan on remand. *See* Pet. App. 41a-44a. The court reasoned

SUMMARY OF ARGUMENT

Petitioners offer only one basic argument for holding the Chambers County Commission liable under section 1983 based on Sheriff Morgan's law enforcement activities. They contend that the Sheriff *looks* more like a county official than a state official. In so arguing, they ignore the real issue. Under *Monell v. Department of Social Servs.,* 436 U.S. 658 (1978), and its progeny, in order to determine whether the Sheriff is a "policymaker" for the County, it is necessary to go beyond appearances and examine the actual distribution of authority over law enforcement under state law. Such an examination reveals that the Sheriff does not speak for the County in the area of law enforcement, because his authority over law enforcement does not emanate from the County Commission and cannot be withdrawn by the County Commission. In fact, the County, as such, is not authorized to play any role in law enforcement at all.

1. It is undisputed that the question presented in this case should be answered based on state law. *See Jett v. Dallas Indep. School Dist.,* 491 U.S. 701, 737 (1989); *City of St. Louis v. Praprotnik,* 485 U.S. 112, 123 (1988) (plurality opinion). Here, the Alabama Constitution expressly designates sheriffs as *state* executive officials. Ala. Const. art. V, § 112. All oversight of their operations is exercised by other state officials—the governor, the attorney general, judges and district attorneys. County commissions have no authority over sheriffs' law enforcement activities. Nor are they authorized under state law to have *any* policies of their own in the field of law enforcement. The Eleventh Circuit was thus plainly correct when it held that the Sheriff was not exercising "county power," or creating county "policies," when he authorized the drug raids at issue here.

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that there was insufficient evidence to allow a reasonable fact-finder to conclude that the Sheriff's approval of the raids at the Capri Club reflected intentional racial discrimination on his part.

2. Petitioners argue that the role of the Chambers County Commission in law enforcement is irrelevant since the Sheriff speaks for "the County" in that field. This argument is fundamentally inconsistent with the analysis of section 1983 set forth in *Monell*.

a. The reason the *Monell* Court decided to treat municipalities as "persons" under the statute was their status as separate corporations. The Court concluded that, at the time of section 1983's passage, it was understood that corporations are "persons" for most purposes. 436 U.S. at 687-89. But if that is the legal basis for allowing municipal liability, it makes no sense to hold counties liable for acts of sheriffs over whom they have no control. A "corporation," after all, does not typically (if ever) include officers or employees who have the power to bind the corporate entity but are immune from control by its governing board. Petitioners are in reality offering a conception of a municipality as a unit of *geography*, with the county governing board being held strictly liable for all violations of federal law committed by any official who happens to operate in that particular geographic area. *Monell* does not support such an approach.

b. Indeed, *Monell* specifically limits municipal liability to cases where the municipality *caused* the violation pursuant to an official policy. 436 U.S. at 692. This limitation was based both on the language of section 1983, *id.* at 691-92, and on Congress's rejection in 1871 of the Sherman amendment—a proposal that would have held municipalities vicariously liable for the violent actions of their private citizens, *id.* at 693-94. This causation requirement plainly is not satisfied in this case.

To begin with, as the *Monell* Court noted, the one thing that Congress clearly did not intend was imposition of liability for law enforcement actions or inactions *on municipal entities not authorized to engage in law enforcement*. That is precisely what petitioners seek to impose in this case. More generally, *Monell* held that the causation requirement precludes actions against municipalities based on a *respondeat superior* theory. Here, however, petitioners' claim would fail even under a *respondeat superior* theory, since they do not claim that the County Commission has control over the Sheriff. Thus, petitioners are asking the Court to impose a form of vicarious liability even broader than that *rejected* in *Monell*.

c. Petitioners' argument that this case is controlled by *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), is wholly unpersuasive. That case did not involve the question whether a sheriff is a county policymaker. While the Court noted, and did not take issue with, the *Sixth Circuit's* holding that a sheriff spoke for a county, it did not analyze the question itself. *Id.* at 484. In any event, *Pembaur* involved Ohio law, which is very different from Alabama law with respect to the relationship between sheriffs and county governing boards.

d. Petitioners have also failed to offer any commonsense explanation of why counties in Alabama should be liable for the actions of sheriffs. There is no danger that states will seek to insulate their municipalities from liability by transforming other municipal officials into state officials operating outside the control of municipal governing bodies. Nor would the cause of deterrence be served by imposing liability on a party that is powerless to prevent future violations of federal rights.

What petitioners are really seeking here is guaranteed access to the County's "deep pocket." But that is not a proper basis for expanding the scope of section 1983. In *most* section 1983 actions, the only available defendant is the individual official, sued in his individual capacity. That is what Congress intended in every case except those where municipalities directly cause violations of federal law. That did not occur here.

ARGUMENT

The Eleventh Circuit correctly ruled that Sheriff Morgan's law enforcement decisions could not form the basis of a section 1983 action against Chambers County. Municipal liability under section 1983 arises only when the municipality itself has "caused" a deprivation of federal rights through the establishment of an illegal policy. That requirement is satisfied in a case where the official accused of wrongdoing was exercising policymaking authority previously delegated by the municipality's governing body, and is therefore subject to that body's potential control. The requirement is *not* satisfied, however, where a plaintiff seeks to hold a municipality liable for the actions of a person holding an office it did not create, wielding power it did not delegate, in ways it cannot control. Such a result would amount to an extreme form of vicarious liability—precisely the rule rejected by this Court in *Monell*. Thus, where, as here, state law establishes a locally based state office, immune from control by the county commission, section 1983 is properly interpreted as authorizing a suit only against the person who holds that office, and not against the county.

I. THE QUESTION PRESENTED HERE TURNS ON STATE LAW.

Section 1983 provides a remedy for violations of federal law occurring under color of state law. In the large majority of cases, including all cases involving state officials and most involving local officials, the only potential defendants are the public officials themselves, sued in their individual capacity. In *Monell*, this Court held that cities and counties are also "persons" within the meaning of section 1983, and thus may be held liable for their violations of the Constitution or federal law *if* those violations occur pursuant to an official governmental policy or custom. Such a policy or custom, the Court added, may be created by the municipality's legislators or "by those

whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694.

Since *Monell*, the Court has addressed the question whether particular municipal officials had sufficient authority to constitute municipal "policymakers." *See City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (city department heads and employment policy); *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701 (1989) (school principal and superintendent and policy governing employee transfers). *See also Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (ruling that a "single act" may constitute a "policy"). It has not addressed a question like that presented here—*i.e.*, whether a given official, who clearly possesses policymaking authority, is properly viewed as a policymaker for a particular municipal government.

Praprotnik and *Jett* are nevertheless important in the present context, because they make it clear that this case must be resolved on the basis of *state* law. *See Jett*, 491 U.S. at 737; *Praprotnik*, 485 U.S. at 123 (plurality opinion). *See also* Pet. Br. 15 (acknowledging that state law governs). "As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." *Jett*, 491 U.S. at 737. Using relevant legal materials, it is up to the judge to identify those officials who "speak with final policymaking authority for the local governmental actor" whom the plaintiff seeks to hold liable. *Id.*

II. THE ELEVENTH CIRCUIT'S DETERMINATION THAT SHERIFFS IN ALABAMA ARE NOT COUNTY POLICYMAKERS WAS BASED ON A STRAIGHTFORWARD APPLICATION OF STATE LAW.

The Eleventh Circuit ruled that sheriffs do not set law enforcement policies for Alabama counties. That ruling

was based on principles of state law that are neither disputed nor controversial. Especially in view of the Court's practice of "generally accord[ing] great deference to the interpretation and application of state law by the courts of appeals," *Pembaur*, 475 U.S. at 484 n.13, there is no reason for this Court to reach any other conclusion.

The court of appeals focused, in its analysis of state law, on the distribution of authority over law enforcement activities in Alabama. First, the court noted that the Alabama Constitution expressly includes sheriffs in the "executive department" of *state* government. Ala. Const. art. V, § 112; *see* Pet. App. 32a; p. 2 *supra*. This designation is reflected in the fact that county commissions in no way control the activities of sheriffs. *See Terry v. Cook*, 866 F.2d 373, 379 (11th Cir. 1989) (no authority to hire or fire deputies); *King v. Colbert County*, 620 So. 2d 623, 625 (Ala. 1993) (no control over jail operations). As a result, in state cases, a sheriff is not treated as an " 'employee of a county for purposes of imposing liability on the county under a theory of respondeat superior.' " Pet. App. 32a (quoting *Parker v. Amerson*, 519 So. 2d 442, 443 (Ala. 1987)). *See also King v. Colbert County*, 620 So. 2d at 625 ("The sheriff's authority over the jail is totally independent of the Colbert County Commission. . . . Therefore, . . . Colbert County itself cannot be held vicariously liable for his actions or inaction."). In other words, under state law, a sheriff is not even an *agent* of the county—let alone a *policymaker*.

The Eleventh Circuit went on to consider whether Sheriff Morgan, in performing a law enforcement function, might still be said to be setting county policy by exercising " 'county power.' " Pet. App. 33a (quoting *Parker v. Williams*, 862 F.2d 1471, 1478 (11th Cir. 1989)). It determined that law enforcement duties are assigned directly to sheriffs by state statute, *id.* (citing Ala. Code § 36-22-3(4)), and that *counties* are barred by state law from playing any role in law enforcement,

id. at 33a-34a.[10] As a result, the court held, the sheriff could not have been "the final repository of Chambers County's general law enforcement authority, because it has none." Pet. App. 34a.[11]

In sum, the court of appeals determined, based on its review of state law, that the express designation of sheriffs as state officials in the Alabama Constitution was not some sort of sham, perhaps intended to avoid liability under section 1983, but fairly reflected the long-standing distribution of power. Sheriffs in Alabama do have a substantial degree of policymaking authority in the area of law enforcement. But, as the court of appeals recognized, this authority did not come from the county commissions and could not be retracted by those commissions. Counties simply do not play a role in setting law enforcement policy, and thus should not be exposed to liability under section 1983 when such policies are established by state officials whom they do not control. *See also Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989), *cert. denied*, 495 U.S. 929 (1990) (county cannot be sued for misfeasance in jail run by sheriff who answers only to the electorate and not to the county board); *Baez v. Hennessy*, 853 F.2d 73, 77 (2d Cir. 1988), *cert. denied*, 488 U.S. 1014 (1989) ("Where, as here, controlling law places limits on the County's authority over the district attorney, the County cannot be said to be respons-

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[10] The court of appeals explained that no statute authorizes counties to play a role in law enforcement and that, under state law, counties are " 'authorized to do only those things permitted or directed by the legislature of Alabama.' " Pet. App. 33a (quoting *Lockridge v. Etowah County Comm'n*, 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984)).

[11] *See also Cofield v. Randolph County Comm'n*, 844 F. Supp. 1499, 1501-02 (M.D. Ala. 1994); *Forehand v. Roberts*, Civ. A. No. 92-A-601-N, 1992 WL 554241, at 1 (M.D. Ala. August 11, 1992); *Smith v. Arndt*, No. CV 92-H-1227-NE, 1992 WL 547727, at 1 (N.D. Ala. July 14, 1992); *Sanders v. Miller*, 837 F. Supp. 1106, 1109-10 (N.D. Ala. 1992).

ible for the conduct at issue."); *Soderbeck v. Burnett County*, 821 F.2d 446, 451-52 (7th Cir. 1987) (where state law designates sheriff as a state official, and he is independent of county control in the area of law enforcement, sheriff is not a county policymaker for purposes of section 1983).

This straightforward conclusion is confirmed by aspects of state law the Eleventh Circuit did not discuss in its opinion—specifically, the law establishing who *does* oversee sheriffs in the exercise of their law enforcement functions. The *only* officials authorized to do so are state officials. Thus, by statute, the governor, the attorney general and the district attorney are authorized to direct a sheriff to undertake a criminal investigation and report the results. Ala. Code § 36-22-5.[12] The governor may also require a written report, under oath, about any aspect of a sheriff's duties. Ala. Const. art. V, § 121. If misconduct occurs, impeachment proceedings against a sheriff are initiated by the Attorney General, at the Governor's request, and tried before the Alabama Supreme Court—a reform intended to tighten state control over law enforcement activities by sheriffs in order to protect the civil rights of private citizens.[13] Finally, the minimum qualifications and training requirements for sheriff's office personnel are all specified in a state statute, with a state agency determining which training programs are adequate. Ala. Code § 36-21-46. County commissions, by contrast, cannot direct the activities of sheriffs and cannot, under any circumstances, remove them from office.

Petitioners and their *amici*, without denying that sheriffs operate free of control by county commissions, seek to dilute the impact of that fact in various ways.

[12] Moreover, the state legislature is, of course, free at any time to address any aspect of a sheriff's performance.

[13] *See* pp. 3-4 *supra*. This impeachment power has been exercised on a number of occasions. *See Parker v. Amerson*, 519 So. 2d 442, 444 n.1 (Ala. 1987) (citing examples).

For example, they point out that some state employees, such as employees of the state police, are more closely supervised at the state level than are sheriffs. But the fact that the State has allowed sheriffs (along with many other officials) a fair degree of autonomy in their everyday operations does not mean that *counties* are somehow responsible for their actions. The State retains a significant oversight role; a county commission has none whatsoever.

Similarly, petitioners suggest that the funding of sheriffs by counties is somehow significant. But, as we have noted, this funding is governed by state-law mandates that sheriffs may enforce in court, including a statute setting sheriffs' salaries, *id.* § 36-22-16, and another requiring provision of all necessary equipment and supplies, *id.* § 36-22-18. This funding mechanism thus represents an *obligation* imposed on counties, not a grant of authority. There is no reason to assume that the intent or the effect was to give counties a role in law enforcement. *Cf. Soderbeck*, 821 F.2d at 451 (Wisconsin sheriff not a county policymaker, although locally elected and funded through county).

For these reasons, the Eleventh Circuit had no real choice but to conclude that Chambers County could not be sued based on the law-enforcement activity of Sheriff Morgan. As Justice O'Connor observed in her plurality opinion in *Praprotnik*, the "States have extremely wide latitude in determining the form that local government takes," and this has predictably produced "a rich variety of ways in which the *power of government* is distributed among a host of different officials and official bodies." 485 U.S. at 124-25 (emphasis added). Given this reality, "a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Id.* at 126. Nor should it second-guess state-law limitations on municipal policymaking, by holding a county liable for

"policies" adopted by an autonomous state official with respect to matters that are wholly outside the authorized scope of county activity.

III. PETITIONERS' ARGUMENT FOR TREATING AN ALABAMA SHERIFF AS A COUNTY POLICYMAKER IS NOT ONLY UNPERSUASIVE BUT FUNDAMENTALLY INCONSISTENT WITH THIS COURT'S RULING IN *MONELL*.

Petitioners respond to the ruling below, not by disputing the Eleventh Circuit's analysis of state law, but by reframing the question. They suggest that the power of the Chambers County Commission in the area of law enforcement is irrelevant, because the Sheriff himself is properly viewed as an autonomous local official who sets law enforcement policy for "the County." They base this conclusion on the fact that the Sheriff has some of the characteristics commonly associated with local officials—*i.e.*, (1) local election, (2) a local area of operations, and (3) funding through the county budget process.

This argument amounts to an assertion that the Sheriff "looks like" a county official and therefore must be a county policymaker.[14] The flaws in such a superficial approach, and the virtues of the Eleventh Circuit's focus on the actual allocation of power in the Alabama governmental structure, are readily apparent if one looks at the decision in which this Court first recognized municipal liability under section 1983—*Monell*. It is striking that,

[14] Petitioners go so far as to quote general treatises on law enforcement, and to analyze the etymology of the word "sheriff," Pet. Br. 18-19—as if either of these sources could establish what governmental structure currently exists in Alabama. For what it may be worth, their linguistic analysis is incomplete. "Sheriff" is a combination of the Old English words for "shire" and "reeve." Webster's Third New Int'l Dictionary 2094 (1986). A "reeve," in turn, was a "local administrative agent of the king in Anglo-Saxon times." *Id.* at 1907. Thus, a "sheriff" in Britain usually administered a county or shire "by royal appointment," *id.* at 2094, and was not a "local" official in the usual sense.

in the first post-*Monell* case dealing with the question whether a given official is properly treated as a state policymaker or a county policymaker, petitioners and their *amici* say little or nothing about *Monell* itself. The reason is clear: the Court's opinion in that case *precludes* a ruling for petitioners here.

A. Petitioners' Argument Cannot Be Squared with the Primary Factor that Led this Court to Recognize Municipal Liability in *Monell*—the Status of Municipalities as Separate "Corporations" Under State Law.

The first aspect of *Monell* that is relevant here is the basis on which this Court decided to treat municipalities as "persons" within the meaning of section 1983—the fact that they are organized as "corporations" under state law.[15] The *Monell* Court determined, based on the Dictionary Act and various court decisions, that by 1871 corporations (including "municipal corporations") were generally treated as "persons" for purposes of statutory analysis. 436 U.S. at 687-89. In the Dictionary Act, passed just months before the Civil Rights Act of 1871, Congress had provided that " 'in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense.' " *Id.* at 688 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431). The Court thus concluded that "the

[15] Much of the *Monell* decision was devoted to explaining why the Court was wrong in *Monroe v. Pape*, 365 U.S. 167 (1961), when it held that the legislative history of the Civil Rights Act of 1871 (more specifically Congress's rejection of the "Sherman amendment") precluded an interpretation of the statute as covering municipalities. The only affirmative support for municipal liability identified by the *Monell* Court in the legislative history came in (1) various statements anticipating a broad interpretation of the statute, and (2) statements by Representative Bingham anticipating that takings claims would be actionable under the statute. 436 U.S. at 683-87.

'plain meaning' of [section 1983] is that local government bodies were to be included within the ambit of the persons who could be sued." *Id.* at 689.

This view of municipalities as separate public corporations is a consistent theme throughout the *Monell* opinion and throughout the legislative record analyzed in that opinion.[16] It was what led the Court to equate municipalities with the other "persons" who could be sued under section 1983—*i.e.*, individual public officials in their individual capacities. *See, e.g.*, 436 U.S. at 685-86 ("[S]ince municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied by [section 1983] . . . there is no reason to suppose that municipal corporations would have been excluded from the sweep of [section 1983]."). [17]

Eleven years later, the Court followed the same approach when it came time to decide whether the states themselves are "persons" within the meaning of section 1983. In *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), the Court again discussed the definition of "person" in the Dictionary Act, concluding that the phrase "bodies politic and corporate" was "used to mean

[16] *See, e.g.*, 436 U.S. at 668 (opponents of Sherman amendment thought Congress could not "obligate *municipal corporations* to keep the peace if those corporations were neither so obligated nor so authorized by their state charters") (emphasis added); *id.* at 669 (constitutional objections to Sherman amendment "would not have prohibited congressional creation of a civil remedy against state *municipal corporations* that infringed federal rights") (emphasis added).

[17] *See also* 436 U.S. at 682 (1871 Congress saw "no distinction of constitutional magnitude between officers and agents—including corporate agents—of the State"); *id.* at 707-08 (Powell, J., concurring) ("Thus, it has been clear that a public official may be held liable in damages when his actions are found to violate a constitutional right . . . . Today the Court recognizes that this principle also applies to a local government when implementation of its official policies or established customs inflicts the constitutional injury.").

corporations, both private and public (municipal), and not to include the States," *id.* at 69 (emphasis added). The Court in *Will* thus left *Monell* undisturbed, while holding that Congress did not intend to authorize suits against "States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes." *Id.* at 70.[18]

In recognizing this distinction, the Court was not drawing on a clean slate. The "perception of local political subdivisions as mere chartered corporations remained largely unchanged during the nineteenth century." Durschlag, *Should Political Subdivisions Be Accorded Eleventh Amendment Immunity?*, 43 DePaul L. Rev. 577, 590 (1994). Moreover, the common law has long differentiated between municipal corporations and other governmental entities created by the state by allowing only the former to be sued for the torts of their agents. *See, e.g.*, 2 J. Dillon, *Municipal Corporations* § 966 (4th ed. 1890) ("As respects *municipal corporations proper*, whether specially chartered or voluntarily organiz[ed] . . ., it is, we think, universally considered . . . that *they are liable for acts of misfeasance* . . . done by their authorized agents or officers . . . .") (emphasis in original).[19]

But accepting petitioners' argument—that the Chambers County Commission is liable for policies created by the incumbent in an office that it did not create and cannot control—would require the Court to abandon this con-

[18] In this instance, the district court dismissed all damages claims against the Sheriff in his official capacity on Eleventh Amendment grounds. Petitioners have not questioned that ruling, even as they have persisted in pursuing claims against the County.

[19] Indeed, the traditional rule was that incorporated cities could be sued but counties could not, precisely because the latter were not formally chartered as corporations and thus were viewed as "political divisions of the State created for convenience." 2 J. Dillon, *supra*, § 963; *see* 18 E. McQuillin, *Municipal Corporations*, § 53.05 (3rd ed. 1993).

ception of municipalities as corporations. A "corporation" has a single governing board that controls its operations and either sets its "policies" or delegates that function to the officers. It is almost incoherent to suggest that a single corporation can include both a governing board and a separate official vested with unchecked authority to set corporate policy. That reality is reflected in the way that the *Monell* Court referred interchangeably to suits against "municipalities," 436 U.S. at 690, suits against "[l]ocal governing bodies," *id.*, and suits against a local "government as an entity," *id.* at 694.

Indeed, the precise issue raised here by petitioners—whether a county as a municipal corporation can encompass both a governing board and an autonomous sheriff—was anticipated by one of the congressmen whose statements in the 1871 debates were partially quoted in *Monell* (*see id.* at 680), Representative Burchard. As he put the matter:

> *Police powers are not conferred upon counties as corporations.* . . . The county commissioners . . . have [the] power to levy taxes, but they do not have any control of the police affairs of the county and the administration of justice. *These powers, I grant, are conferred in part by State laws upon some elective officers, such as the sheriff of a county* . . . . But still in few, if any, States is there a statute conferring this power upon the counties.

Cong. Globe 795 (April 19, 1871) (emphasis added). Representative Burchard then went on to express his opposition to the "Sherman amendment"—a proposal that would have held counties liable for failure to enforce the law within their borders—asserting that it was an "attempt to impose obligations upon a county for the protection of life and person which are not imposed by the laws of the State, and that it is beyond the power of the General Government to require their performance." *Id.* Thus, at least to him, it was clear that the existence of a sheriff in

a county did not mean that the county as a corporation had any role in, or responsibility for, law enforcement—or that it was constitutional to pretend otherwise by imposing liability on counties when sheriffs failed to keep the peace.

In essence, what petitioners ask the Court to adopt is a radically different conception of "Chambers County" as a unit of *geography*, which can have "policies" that are set both by the County Commission (including those officials to whom the commission delegates authority) *and* by any other officials authorized by state law to operate in that geographic area.[20] But it was not suits against units of geography but suits against "municipalities," defined as units of *government*, that the Court had in mind in *Monell*. *See* 436 U.S. at 694 ("[I]t is when execution of a government's policy or custom . . . inflicts the injury that the *government* as an entity is responsible under § 1983.") (emphasis added). The only basis for treating municipalities as "persons" under section 1983 was the *Monell* Court's understanding of cities and counties as corporate entities with a separate, coherent and cohesive structure and a single governing body. It would make no sense to abandon that understanding and thereby expand municipal liability beyond anything that Congress could have had in mind.

B. Petitioners' Argument is Also Inconsistent With the Causation Requirement Recognized in *Monell*.

The tension between petitioners' position and *Monell* is even clearer in light of the Court's second holding—that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal *policy*

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[20] State officials whose functions "concern the whole state or its people generally, although territorially restricted," such as sheriffs, district attorneys, and judges, are common. Traditional local government law treats these as officers distinct from municipal officers, whose "powers and duties relate exclusively to matters of purely local concern." 2 E. McQuillin, *supra*, § 4.115, at 245-46.

of some nature *caused* a constitutional tort." 436 U.S. at 691 (emphasis added). *See also id.* at 694 (allowing municipal liability since the case "unquestionably involve[d] official policy as the *moving force* of the constitutional violation") (emphasis added). In every legal and practical sense, it is absurd to suggest that Chambers County as a municipal corporation (or the Chambers County Commission as its governing body) adopted or ratified a law enforcement policy that caused the alleged violations of petitioners' constitutional rights.

1. *Origins of the Causation Requirement.*

The causation requirement in *Monell* was derived, in part, from the language of section 1983, which creates a right of action against "any person who . . . shall subject or cause to be subjected" any other person to a deprivation of federal rights. As the Court recognized, this "language plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights," but it also "suggests that Congress did not intend § 1983 liability to attach where such causation was absent." 436 U.S. at 692. *See also Pembaur*, 475 U.S. at 478 ("*Monell* is a case about responsibility.")

Even more important to the Court's conclusion was "the legislative history, which disclosed that, while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of *others*." *Id.* at 479 (emphasis in original). This insight was derived from rejection in the House of Representatives of the "Sherman amendment," a proposed addition to the same act that contained section 1983, which, as noted above, would have imposed liability on municipalities whenever private citizens within their borders " 'riotously and tumultuously assembled . . . with intent to deprive' " another person of a federal right. *See*

Monell, 436 U.S. at 666 (quoting the first conference version of the amendment). *See also Jett*, 491 U.S. at 726-27.

As the *Monell* Court exhaustively demonstrated, this proposal was defeated on the ground that many of "the local units of government upon which the amendment fastened liability were not obligated to keep the peace at state law and further that the Federal Government could not constitutionally require local governments to create police forces," either directly or through imposition of liability for damages. 436 U.S. at 673. Numerous members of the House asserted in the debates that "[c]ounties and towns are subdivisions of the State government, and exercise in a limited sphere and extent the powers of the State delegated to them; they are created by the State for the purpose of carrying out the laws and policy of the State, and are subject only to such duties and liabilities as State laws impose upon them." Cong. Globe 794 (April 19, 1871) (Rep. Poland). *See also id.* at 791 (Rep. Willard) ("The city and the county have no power except the power that is given them by the State."); p. 22 *supra* (quoting Rep. Burchard). The majority thus objected that "if we have the right to lay this obligation upon them, to require them to meet these damages, it must draw after it the power to go in there and say, 'You shall have a police, you shall have certain rules by which you may fulfill your obligation' " to keep the peace. *Id.* at 795 (Rep. Blair).

In sum, the legislative history reveals "ample support for [Representative] Blair's view that the Sherman amendment, by putting municipalities to the Hobson's choice of keeping the peace or paying civil damages, attempted to impose obligations on municipalities by indirection that could not be imposed directly." 436 U.S. at 679. But, having reviewed this history, the Court in *Monell* concluded that Congress in 1871 did not create the same "Hobson's choice," because, instead of "imposing an obligation to keep the peace" that did not exist in state law,

section 1983 applied only where "a municipality . . . was obligated by state law to keep the peace, but . . . had not in violation of the Fourteenth Amendment." *Id.*

2. *Application of the Requirement Here*

The *Monell* causation requirement is implicated here in two ways. First, of course, there is a glaring conflict between petitioners' position and the *Monell* Court's specific holding that section 1983 cannot be read to impose liability on municipalities for failure to enforce the law if state law does not grant them law enforcement powers. As the Eleventh Circuit held, the State of Alabama "has not assigned the counties any law enforcement authority." Pet. App. 33a-34a. The Chambers County Commission has no power to enact policies affecting law enforcement or to review those adopted by the sheriff. Yet petitioners now say that the Commission should face potential liability under section 1983 based entirely on the law enforcement actions of Sheriff Morgan.

Indeed, under petitioners' theory, the Commission's only means of avoiding potential liability would be to violate state law and exceed its assigned authority by attempting to control the sheriff. But that is precisely the outcome that Congress sought to avoid when it rejected the Sherman amendment on the ground that it would force municipalities to perform law-enforcement functions not delegated to them by state law. Thus, here again, petitioners ask the Court to adopt a statutory interpretation that would undercut one of the central understandings expressed in *Monell* itself.

At a more general level, this Court held in *Monell* that a municipality may not be held liable "*solely* because it employs a tortfeasor—or, in other words, . . . on a *respondeat superior* theory." *Monell*, 436 U.S. at 691 (emphasis in original). It concluded that Congress, having rejected one limited form of vicarious liability based on constitutional concerns in the Sherman amendment, can

hardly have intended to authorize a broader form that "would have raised all the constitutional problems associated with the obligation to keep the peace." *Id.* at 693. *See also Jett*, 491 U.S. at 728-29. Petitioners' argument, however, would have the perverse effect of allowing a form of vicarious liability under section 1983 that is even more extreme than the *respondeat superior* theory rejected in *Monell*.

Respondeat superior is a doctrine that holds a "master" liable for the torts of a "servant" acting within the scope of his assigned duties. A "servant" is traditionally understood to be "a person employed to perform services in the affairs of another, whose physical conduct in the performance of the service *is controlled, or is subject to a right of control*, by the other." *Prosser & Keeton on Torts* § 70, at 501 (5th ed. 1984) (emphasis added). This principle has been consistently applied in the context of municipal liability law. Thus, one leading treatise states that, in "order to hold a municipality liable in damages because of the tort of one alleged to be its servant, it must appear, and the plaintiff must prove, that the latter was the servant of the municipality at the time of the alleged tort." 18 E. McQuillin, *supra*, § 53.66, at 445. Moreover, "[t]he *right to control* the action of the person doing the alleged wrong, at the time of and with reference to the matter out of which the alleged wrong arose . . . governs in determining whether a municipality is liable under the rule of respondeat superior. The right to *discharge* or *terminate the relationship* is also important." *Id.* (emphasis added). *See also id.* at 446 ("[A] county and its commissioners are not liable for the actions of the sheriff or the sheriff's deputies under the doctrine of respondeat superior because they have no control over the acts of those officers.") (citing *Delk v. Board of Comm'rs of Delaware County*, 503 N.E.2d 436 (Ind. App. 1987)); 2 J. Dillon, *supra*, § 974, at 1193 (municipality may be liable for acts of officials if it "appoints or elects them, can control them . . ., can continue or remove them,

[and] can hold them responsible for the manner in which they discharge their trust"; it is not liable for the acts of those who are "independent of the corporation as to the tenure of their office and the manner of discharging their duties" and thus are properly regarded as "public or State officers"); *Parker v. Amerson*, 519 So. 2d at 442 (Alabama sheriffs are not county employees "for purposes of imposing liability . . . under theory of respondeat superior"); *Hereford v. Jefferson County*, 586 So. 2d 209, 210 (Ala. 1991) (same).

Yet petitioners, purporting to apply an "official policy" standard that was supposed to be more restrictive than *respondeat superior*, advocate a rule of vicarious liability that goes beyond *respondeat superior*—indeed, beyond anything heretofore known to tort law. After all, they seek to hold the Chambers County Commission strictly liable for the acts of an official over whom it has *no* control. And they do so in reliance on factors—such as the Sheriff's election by local voters and funding through the County budget—that have been specifically rejected as *insufficient* to justify municipal liability under a *respondeat superior* standard. *See Barnes v. District of Columbia*, 91 U.S. 540, 545-46 (1876) ("Nor can it in principle be of the slightest consequence by what means these several officers are placed in their position—whether they are elected by the people of the municipality or appointed by the President or a Governor."); *id.* at 546 ("It is equally unimportant from what source he receives compensation, or whether he serves without it."); 18 E. McQuillin, *supra*, § 53.67.

Especially in view of this Court's recent admonition that, in interpreting section 1983, courts should "look first to the common law of torts," *Heck v. Humphrey*, 114 S. Ct. 2364, 2370-71 (1994), there is no reason to read the statute in this extreme way. Congress can hardly have intended in 1871 to authorize a form of municipal liability going far beyond *respondeat superior* and requiring cities and counties to exercise power in areas where they are barred from acting by state law.[21]

C. Nothing in *Pembaur* Supports Petitioners' Position.

Petitioners and their *amici*, while ignoring *Monell*, argue that this case is controlled by the Court's later decision in *Pembaur v. City of Cincinnati*. That case, however, did not deal with the same issue and does not support petitioners' position in this case.

In *Pembaur*, the sole "question presented [was] whether, and in what circumstances, a decision by municipal policymakers *on a single occasion* may satisfy" the *Monell* official-policy requirement. 475 U.S. at 471 (emphasis added).[22] The Sixth Circuit had held that a county sheriff and a county prosecutor were county officials authorized to establish county policy, but had also held that approval of an illegal search on one occasion did not establish a "policy." *See id.* at 476. In the course of ruling that a single decision could constitute an actionable municipal "policy," this Court noted the Sixth Circuit's holding "based upon its examination of Ohio law, that both the County Sheriff and the County Prosecutor could establish county policy under appropriate circumstances." *Id.* at 484. The Court went on to say that this was a "conclusion that we do not question here," *id.*, adding in a footnote that "[w]e generally accord great deference to the interpretation and application of state law by the courts of appeals," *id.* at 484 n.13 (citations omitted).

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[21] Thus, the proper reading of *Monell* is that satisfaction of the *respondeat superior* standard is a necessary but not sufficient basis for municipal liability based on acts of executive officials.

[22] *See also* Brief of Petitioner in No. 84-1160, *Pembaur v. City of Cincinnati* (presenting, as a sole question presented, the following: "Can a single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office fairly be said to represent official policy so as to render a county liable under 42 U.S.C. § 1983?").

As this summary suggests, it is inexplicable how petitioners could assert that *Pembaur* "requires reversal in the present case." Pet. Br. 11. To begin with, there was no dispute in this Court about whether or not the sheriff in *Pembaur* had the kind of links with the county that made it possible for him to be viewed as a county policymaker. Moreover, when the Court touched on that question in passing, it declined to analyze it—choosing instead to defer to a ruling of the Sixth Circuit on an issue of state law that had not been addressed in the parties' briefs.

In any event, even if *Pembaur* were fairly read as having approved the Sixth Circuit's holding that a sheriff was a county policymaker, the case would have little relevance here. Any such holding in *Pembaur*, of course, would have been based on Ohio law, which, unlike Alabama law, plainly treats sheriffs as county officials.[23] Here, the issue is one of Alabama law, and there is every reason for the Court to adhere to its stated practice of

[23] *See, e.g., State ex rel. Trago v. Evans*, 141 N.E.2d 665, 669 (Ohio 1957) (office of sheriff "is a county office created by legislative enactment"); Op. Ohio Att'y Gen. No. 90-091, at 9 (1990) ("[A] sheriff . . . and his deputies . . . are the chief law enforcement officers of a county."). As in Alabama, Ohio counties fund sheriffs and there is a sheriff in each county. Unlike Alabama, however, Ohio permits home rule, and its counties are recognized as having law enforcement power. *Compare id.* (counties may join with towns to coordinate regional law enforcement efforts), *with* Pet. App. 33a-34a (Alabama counties have no law enforcement role). Moreover, Ohio's chartered counties have significant control over their sheriffs. They control the manner in which sheriffs are chosen and may change the position of sheriff from an elective office to an appointive one. *See* Ohio Rev. Code Ann. § 302.01 (permitting chartered counties to choose an alternative form of government); Op. Ohio Att'y Gen. No. 85-039 (1985) (allowing the appointment of officers who are elected under general state law). In some instances, Ohio county boards select a replacement when the sheriff's office is vacant. *See* Ohio Rev. Code Ann. § 305.02. Moreover, unlike their counterparts in Alabama, Ohio sheriffs have an explicit duty to file reports with the county board. *See* Ohio Code Ann. § 305.19.

"accord[ing] great deference to the interpretation and application of state law" by the Eleventh Circuit in *this* case.

D. Petitioners Have Offered No Persuasive Reason Why the Court Should Hold Municipalities Liable for the Actions of Officials Whom They Do Not Select or Control.

Petitioners, having failed to explain why their theory makes legal sense, also fail to advance any other persuasive argument for extension of municipal liability to a case like this one. First, they suggest that it would be anomalous for a locally elected and locally based official to be considered a *state* policymaker. Pet. Br. 17 ("that simply cannot be the case").[24] But nothing could be more commonplace. State judges, for example, in Alabama and elsewhere, are locally elected and locally based.

Indeed, the real anomaly here would be a rule that accords sheriffs, acting in their official capacity, Eleventh Amendment immunity from suit as state officials (as even the district court recognized was necessary, *see* pp. 5-6 *supra*) but simultaneously holds county commissions strictly liable for the constitutional torts of those state officials. This would require a single official to be both a county policymaker *and* the equivalent of the State when sued in his official capacity.

Petitioners also argue that the Eleventh Circuit's approach leaves states the power to insulate municipalities from all liability, simply by relabelling municipal officials as state officials. Pet. Br. 13. But, of course, that is not true either. The only way in which a state could limit municipal liability for the actions of senior municipal officials would be to change the law so that they are no longer controlled by the municipal legislative body.

[24] Although a sheriff is locally elected, a vacancy in that office is filled by the Governor. Ala. Code § 36-9-17. Petitioners' emphasis on mode of selection suggests that they would see two types of sheriffs: those who are elected and are treated as county officials and those who are appointed and are treated as state officials.

Merely designating a mayor or a city police chief as a "state official," without more, would change nothing in the typical urban governmental set-up—because any power exercised by these officials would still be subject to revocation or modification by the city council. And states are hardly likely to go on a binge of restructuring local government so that local lawmakers no longer have control over local executive officials.[25]

Nor would a deterrence rationale justify extending municipal liability to cover this case. This is not a case like *Pembaur*, where it was plausible to say that "[t]he county has the resources and the authority that can best avoid future constitutional violations," 475 U.S. at 490 (Stevens, J., concurring). Here, it is undisputed that if Chambers County is ultimately held liable to petitioners, it will have *no* authority to prevent a recurrence of the alleged constitutional violation. That is precisely why the Eleventh Circuit concluded that no *county* policy was implicated in this case.

Ultimately, petitioners seem to say that it would be unjust for them not to be able to sue a municipal defendant in this case. But that is probably the strangest of all of the arguments presented here. After all, it is the *norm* in section 1983 litigation for plaintiffs to be limited to suing individual defendants. That is what the statute, with its reference to "persons," was intended to accomplish.

This Court has subsequently recognized that municipalities may be "persons" when they *cause* violations of federal rights. But it has also refused, in *Monell* and *Will*, to expand plaintiffs' access to the public funds where the

[25] It is noteworthy, in this regard, that the Supreme Court's decision in *Lincoln County v. Luning*, 133 U.S. 529 (1890), which held that municipal corporations are not protected by the Eleventh Amendment, has had no apparent effect on the proliferation of municipal corporations and local government entities. *See* Durschlag, *supra*, at 615. There is thus no reason to believe that a decision for respondent in this case would lead to a massive restructuring of local government.

only justification is their desire for a "deep pocket." Indeed, *Monell* expressly rejected reliance on the perceived need to "spread" the "costs" of governmental torts to the public as a whole as a basis for importing a rule of vicarious municipal liability into section 1983. 436 U.S. at 694-95.

In sum, there is no reason to warp the principles of municipal liability in this case to give petitioners one more defendant to sue. This Court has recognized that Congress intended to allow municipalities to be sued under section 1983 in a specific set of circumstances—when they adopt policies that lead to deprivations of federal rights. It is entirely spurious to suggest that, in this case, the Chambers County Commission did any such thing.

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

PAUL M. SMITH *
BRUCE J. ENNIS
DONALD B. VERRILLI, JR.
THOMAS J. PERRELLI
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

JAMES W. WEBB
KENDRICK E. WEBB
BART HARMON
WEBB & ELEY, P.C.
166 Commerce Street
Suite 300
Post Office Box 238
Montgomery, Alabama 36101
(202) 262-1850
Counsel for Respondent

September 30, 1994

* Counsel of Record

No. 93-1636

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

TOM SWINT, et al.,

Petitioners,

v.

CHAMBERS COUNTY COMMISSION, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

ROBERT B. MCDUFF*
771 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

CARLOS A. WILLIAMS
Post Office Box 306
Mobile, Alabama 36601
(205) 434-2478

BRYAN STEVENSON
BERNARD HARCOURT
114 North Hull Street
Montgomery, Alabama 36104
(205) 269-1803

Counsel for Petitioners
*Counsel of Record

22 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional and Statutory Provisions

Other Materials

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REPLY BRIEF FOR PETITIONERS

I. CONTRARY TO THE RESPONDENTS' POSITION, THE SHERIFF NEED NOT BE SUBJECT TO THE CONTROL AND SUPERVISION OF THE COUNTY COMMISSION IN ORDER TO BE A FINAL POLICYMAKER FOR THE COUNTY.

The primary argument of the respondents is that a sheriff is not a policymaker for the county because his or her power is not governed by the people who sit on the County Commission, and because he or she is not subject to the control and supervision of those people. As the respondents state it:

[T]he Sheriff does not speak for the County in the area of

> law enforcement, because his authority over law enforcement does not emanate *from the County Commission* and cannot be withdrawn *by the County Commission. . . . County Commissions have no authority* over sheriffs' law enforcement activities. Nor are they authorized under state law to have any policies *of their own* in the field of law enforcement. The Eleventh Circuit was thus plainly correct when it held that the Sheriff was not exercising "county power," or creating county "policies," when he authorized the drug raids at issue here.

Respondents' Brief 9 (emphasis added). *See also*, resp. br. 14 (because "county commissions in no way control the activities of sheriffs," therefore "a sheriff is not even an agent of the county -- let alone a policymaker"); 21 (issue is whether "the Chambers County Commission is liable for policies created by the incumbent in an office that it did not create and cannot control"); 28 (contending that petitioners "seek to hold the Chambers County Commission strictly liable for the acts of an official over whom it has no control"); 31 (municipal liability does not exist for officials who are "no longer controlled by the municipal legislative body"); 32 (suggesting an official is a municipal policymaker only where the power exercised by the official "would . . . be subject to revocation or modification by the city council").

The respondents appear to frame the issue as whether the individual county commissioners should be liable for their failure to control the sheriff. But that is not the issue decided by the Eleventh Circuit, nor is it the issue before this Court. Instead, the question is whether, as the Eleventh Circuit stated, the sheriff "is the final law enforcement decisionmaker for Chambers County." Pet. App. 34a. Elected executive officials often set governmental policy in areas in which they are subject to no legislative control or review. Just as a governor can set

statewide executive policy on certain matters for which the state legislature has no oversight, or a mayor can set citywide policy on certain matters for which the city council has no oversight, a sheriff or a county tax assessor or a county coroner can set countywide policy on certain matters for which the county commission has no oversight.[1]

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[1] In this case, the county itself was not named as a defendant, although the county commission was. However, it is clear from the opinions of both the Eleventh Circuit and the district court that county liability (as opposed to liability of the individual county commissioners) for the actions of the sheriff is not dependent upon naming the county as a defendant per se. Instead, both courts reviewed the issue of county liability for the actions of the sheriff without any concern for the fact that the county itself was not named as a defendant. Pet. App. 31a-34a, *Swint v. City of Wadley, Alabama*, 5 F.3d 1435, 1449-1451 (11th Cir. 1993); Pet. App. 67a. Thus, it is apparent that naming as a defendant the county commission, which controls the funds to pay any judgment, is sufficient to raise the issue of the liability of the county itself for the sheriff's actions. The Eleventh Circuit has suggested as much not only in this case, but in others. *See, e.g., Bailey v. Board of Commissioners of Alachua County*, 956 F.2d 1112, 1125 (11th Cir. 1992) (Court reviews county's liability for actions of certain jail officials even though county was not named as a defendant, but county commission was). Indeed, the respondents in the present case have never argued otherwise -- not in the district court, the court of appeals, or in this Court -- and have never contended that the county must be named as a defendant in order to obtain county liability for actions of county officials other than the county commissioners themselves. Rather, as the respondents noted, the issue in this case is the correctness of the Eleventh Circuit's ruling -- as described by the respondents -- "that Sheriff Morgan's law enforcement decisions could not form the basis of a section 1983 action against Chambers County." Resp. br. 12. In addition, the complaint in this case named the sheriff as a defendant in both his individual and official capacities, and the Eleventh Circuit has held that the latter may be sufficient as a means for attaching county liability for the actions of the sheriff if he or she is a final county policymaker. *Parker v. Williams*, 862 F.2d 1471, 1476 n.4 (11th Cir. 1989) (suggesting that a claim against the sheriff in his or her official capacity "may be against [the sheriff] as representative of the county" in cases in which the county itself is not sued directly).

For example, in Alabama the county tax assessor is elected by the county's voters and "in each of the several counties shall have the right and authority to assess all real estate." Ala. Code § 40-7-1. The "coroner for each county" is elected by the county's voters and is discharged with "the general duty . . . to hold inquests." Ala. Code, §§ 11-5-1, 11-5-4. These functions are not supervised by the county commission. However, if a county tax assessor were to adopt an intentionally racially discriminatory policy of assessing taxes, or a coroner were to adopt a policy of refusing inquests for persons of a certain religious view, those unconstitutional policies could certainly be considered county policies even though the county commission has no oversight. This simply recognizes the fact that governmental power is not given exclusively to legislative bodies, and that in some areas, elected executive officials speak for the government rather than legislative officials.

Thus, respondents are wrong to suggest, as they do, that local governments are operated according to the typical corporate business model. According to the respondents, this Court's decision in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), adopted some sort of view of local government as being identical to corporate business government. Resp. br. at 19-22. The respondents specifically contend:

> [A]ccepting petitioners' argument . . . would require the Court to abandon [the] conception of municipalities as corporations. A "corporation" has a single governing board that controls its operations and either sets its "policies" or delegates that function to the officers. It is almost incoherent to suggest that a single corporation can include both a governing board and a separate official vested with unchecked authority to set corporate policy.

Resp. br. at 21-22.

This implies that, for purposes of 42 U.S.C. § 1983, only legislative bodies can make final policy for local governments. It ignores the fact that most governments operate differently than the typical business corporation. Most governments have a separation of powers between executive officials and legislative bodies, with executive officials setting policy in some areas and legislative officials in others. This Court has never said that governmental functions should be viewed through a corporate business model or that legislative officials are the only officials who can ever set governmental policy for purposes of § 1983.

To the contrary, in analyzing § 1983, this Court specifically has recognized that government officials other than legislative bodies can be final local governmental policymakers.

> [I]t is when execution of a government's policy or custom, *whether* made by its lawmakers *or* by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell v. New York City Dept. of Social Services, 436 U.S. at 694 (emphasis added).

> [In § 1983 cases], the trial judge must identify those officials *or* governmental bodies who speak with final policymaking authority for the local government[]. . . .

Jett v. Dallas Independent School Dist., 491 U.S. 701, 737 (1989). By noting in *Monell* that local officials other than "lawmakers" can make policy, and in *Jett* that officials other than "governmental bodies" can make policy, this Court clearly

has rejected the notion that policy can be made only by legislative bodies. Also, while the respondents are correct in noting that *Monell* requires a causal connection between the actions of the policymaker and the constitutional injury, resp. br. at 23-26, *Monell* also makes it clear -- as just noted -- that the policymaker can be someone other than a lawmaker and the causation need not stem from the legislative body.

Moreover, the specific portion of *Monell* which the respondents cite to support their corporate governance argument actually proves the contrary. The relevant point comes from *Monell's* discussion of the Dictionary Act, passed in 1871 shortly before the passage of what is now § 1983. Resp. br. at 19, *citing*, *Monell*, 436 U.S. at 688. As this Court stated in *Monell*, the Dictionary Act's definition of the word "person," by encompassing local governments and corporations, demonstrated that the later use of the word "person" in what is now § 1983 was also meant to include local governments. 436 U.S. at 688-689. However, contrary to the respondents' suggestion at pages 19-22 of their brief, this does not mean that municipalities operate with the same governing structure as typical business corporations. Instead, the Dictionary Act specifically drew a distinction between local governments and business corporations, stating "the word 'person' may extend and be applied to bodies politic *and* corporate." Act of Feb. 25, 1871, § 2, 16 Stat. 431, *quoted in Monell*, 436 U.S. at 688 (emphasis added). Thus, nothing in the Dictionary Act or in *Monell* supports the respondents' contention that a local governmental structure must be viewed identically to a typical corporate business structure.

There is another sense in which the respondents are wrong to contend that municipal liability does not exist for those executive officials, such as sheriffs, who never were or "are no longer controlled by the municipal legislative body." Resp. br.

at 31. Oversight or control by the county legislative body might tend to demonstrate that the sheriff does not exercise what Justice O'Connor's plurality opinion in *City of St. Louis v. Prapotnik*, 485 U.S. 112 (1988) has called "*final* policymaking authority." *Id.* at 123 (emphasis added), *quoting*, *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986). Both *Prapotnik* and *Pembaur* make it clear that *final* policymaking authority by a local official is a prerequisite to local governmental liability for his or her actions, and if the official's authority is subject to review or control by others, it may not be final. Justice O'Connor's opinion in *Prapotnik* explained:

> [A]s the *Pembaur* plurality recognized, the authority to make municipal policy is necessarily the authority to make *final* policy. 475 U.S. at 481-484. When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision *is subject to review* by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies.

485 U.S. at 127 (first and third emphases in original; second emphasis added).

Because, on the one hand, the respondents contend that an official must be under the "control" of the local legislative body in order to set local governmental policy, and because, on the other hand, *Prapotnik* and *Pembaur* make it clear that control by the legislative body may well demonstrate the subordinate official is not a *final* policymaker, the respondents' formulation would likely mean that local governmental liability attaches *only* for the actions of the members of the government's legislative body. But that is simply not the law. As noted

previously, this Court in *Monell* and *Jett* made it clear that officials other than legislators can be final policymakers for local government.

Also, in *Pembaur*, this Court held that county liability existed for the law enforcement actions of two executive officials -- the sheriff and the county prosecutor -- even though there was nothing to suggest that the county governing board had oversight or control of these Ohio county officials in the arena of law enforcement or had delegated authority to them. 475 U.S. at 476, 484-485. In fact, under Ohio law, the only area in which the county commissioners direct and control the sheriff is in the sheriff's charge of courthouse, but in terms of law enforcement and keeping the peace, the sheriff is subject to no such control. Ohio Rev. Code Ann. § 311.07(A).

The federal district court in *Pembaur* initially dismissed the county as a defendant by adopting the same rationale proffered by the respondents here -- that the "Hamilton County Board of County Commissioners, acting on behalf of the county, simply does not establish or control the policies of the Hamilton County Sheriff." 475 U.S. at 475 (quoting the district court). However, as this Court explained, the Sixth Circuit Court of Appeals reversed on that point, holding "that the County Board's lack of control over the Sheriff would not preclude county liability if 'the nature and duties of the Sheriff are such that his acts may fairly be said to represent the county's official policy with respect to the specific subject matter.'" *Id.* at 475, *quoting, Pembaur v. Cincinnati*, 746 F.2d 337, 340-341 (6th Cir. 1984). This Court never questioned the Court of Appeals' reasoning in this respect, and instead affirmed the Court of Appeals' conclusion that the sheriff did establish final policy for the county in the area of law enforcement. 475 U.S. at 476, 484-485. Obviously, if the "control" rationale advocated by the district court in *Pembaur* and the respondents in the

present case were the proper means of analysis, the result in *Pembaur* would have been very different.

The question, then, is not whether the county commission has oversight or control over the sheriff in matters of law enforcement. The question is whether the sheriff makes law enforcement policy for the county, or for some other entity, such as the state. This is discussed in the next section of this reply brief.

II. ALABAMA LAW INDICATES THAT THE SHERIFF EXERCISES POLICYMAKING AUTHORITY ON BEHALF OF THE COUNTY RATHER THAN THE STATE.

The respondents correctly state that this case involves the question of whether the sheriff "is properly treated as a state policymaker or a county policymaker." Resp. br. 19. In arguing the former rather than the latter, they point first to the fact that, under state law, Alabama sheriffs are considered officers of the state rather than employees of the county. Resp. br. 14. But they also note, as did the Court of Appeals in this case, that this label does not answer the question of whether the sheriff sets policy for the county in the area of law enforcement. *Id., citing*, Pet. App. 33a (5 F.3d at 1450). *See also, Parker v. Williams*, 862 F.2d 1471, 1478 (11th Cir. 1989) (the sheriff's "functional role . . . is more significant than his technical status as an employee of the state").

The respondents then contend that because law enforcement duties are assigned directly to the sheriff and not to other officials who operate locally or to the county commission, the sheriff does not carry out any sort of county policy in the area of law enforcement. Resp. br. 14-16. This point was discussed at pages 14-15 and pages 23-26 of the

petitioners' opening brief, and the county commission point was discussed in part I of this reply brief, and those discussions will not be repeated here.

Going beyond the points made by the Court of Appeals, the respondents also cite Ala. Code § 36-22-5 for their contention that the sheriff sets policy for the state. Resp. br. 16. That statute, which is quoted in full in pet. app. 75a-76a, reads in part as follows:

> The sheriffs *in their respective counties*, whenever directed to do so in writing by the district attorney or by the attorney general or governor, shall make special investigation of any alleged violation of the law *in their counties* and shall prepare a written report setting forth what information has been obtained . . . .

(Emphasis added). Also, the respondents cite Ala. Const. Art. V, § 121 allowing the Governor to require written information from various officials, including sheriffs. Resp. br. 16. The fact that the duties of sheriffs include responding to investigatory requests of state officials such as the attorney general or governor does not demonstrate that the sheriff makes policy for the state, particularly when a sheriff's duties in this respect are limited to his or her individual county, and when this is only a small part of the sheriff's overall duties. Moroever, the costs of such a special investigation are to be paid "from the county treasury" based upon a detailed sworn statement which the sheriff "shall file with the county commission" and which the county commission shall audit and reduce if appropriate. Ala. Code § 36-22-6, pet. app. 76a.

Much more important to the issue at hand than the sheriff's limited duty to respond to special investigative requests is the general description under Alabama law that "[i]t shall be the

duty of sheriffs *in their respective counties*, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes *in their counties* . . . ." Ala. Code § 36-22-3(4) (emphasis added), pet. app. 75a. This broad description of a sheriff's law enforcement duties, subject to the control of no one but limited only to the sheriff's county, demonstrates the sheriff is a county rather than a state policymaker.

Next, the respondents cite the involvement of state officials in impeachment proceedings against sheriffs. Resp. br. 16. Of course, impeachment is a very rare event. *See, Parker v. Amerson*, 519 So.2d 442, 444 n.1 (Ala. 1987) (citing only three cases dealing with impeachment of sheriffs). Much more relevant is the identity of those persons who have the power to choose the sheriff at each regular election, and to turn out an incumbent candidate if he or she is not performing satisfactorily -- the voters of each county. Ala. Const. Art. V, § 138, pet. app. 74a. The role of the voters of the county is vastly more important in controlling the activities of the sheriff and in determining who serves and does not serve than the role of state officials on those extremely infrequent occasions when impeachment is attempted. *See, City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269 (compensatory damages awarded against a local government under § 1983 "may themselves induce the public to vote the wrongdoers out of office"). This strongly demonstrates that the sheriff sets policy for the county and its citizens rather than for state officials.

Also, the respondents mention Ala. Code § 36-21-46, requiring certain qualifications for law enforcement officers in the state, including those employed by sheriffs -- but not requiring those qualifications for sheriffs themselves. Resp. br. 16. However, a state statute setting qualifications for people who work in a local law enforcement office does not mean the

head of the office -- in this case, the sheriff -- sets policy for the state. For example, the statute cited by the respondents also governs officers employed by city police chiefs and county constables, but it does not mean that chiefs and constables set statewide law enforcement policy.

Thus, nothing cited by the Eleventh Circuit or the respondents in this case leads to the conclusion that a sheriff sets law enforcement policy for the state, as opposed to the particular county.

Moreover, although the sheriff's law enforcement duties are not controlled by the county commission, there is a sense in which he or she works with the county commission and must abide by commission decisions, particularly in terms of financing the law enforcement effort of the sheriff. The county commission is charged with providing all of the sheriff's office, equiptment, and operations expenses, "as are reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office." Ala. Code § 36-22-18, pet. app. 77a-78a. Because this duty falls on the commission, presumably the commission makes the decision as to the level of funding "reasonably needed" and provides the sheriff with that specific amount. The commission also determines whether various monies from fees, commissions, or costs may be retained by the sheriff or instead paid into the general fund of the county. Ala. Code § 36-22-17, pet. app. 77a. Thus, while the commission does not control the sheriff's law enforcement activities, it is intimately involved with and makes decisions about an important part of those activities -- the funding of them. This demonstrates that the sheriff's law enforcement activities are tied much more to the local level than the state level, indicating that the sheriff is a county policymaker rather than a state policymaker.

Finally, the respondents concede that "Sheriffs in Alabama

do have a substantial degree of policymaking authority in the area of law enforcement." Resp. br. 15. But they fail to explain how each of the 67 sheriffs in Alabama's 67 counties can be said to make law enforcement policy *for the state*. For example, while the Sheriff of Chambers County may have adopted a policy of permitting the type of raids that occurred in this case -- with an entire nightclub of people held at gunpoint for 90 minutes because of one drug sale in the club, pet. app. 4a-7a, 5 F.3d at 1439-1440 -- the sheriff of a neighboring county may have adopted an opposite policy. Which is the policy of the State of Alabama? The answer is that neither sheriff can set statewide law enforcement policy, particularly given that the operations of each is limited to his or her specific county. Instead, the sheriff sets policy in and for the county.

III. THE ELEVENTH CIRCUIT'S HOLDING IN THIS CASE IS INCONSISTENT WITH THIS COURT'S DECISION IN *PEMBAUR v. CINCINNATI.*

With respect to *Pembaur v. Cincinnati*, respondents are correct when they state that this Court deferred to and adopted the Sixth Circuit's ruling on the point of county liability for the actions of the sheriff. Resp. br. 30. But *Pembaur* is nevertheless important, and its result is controlling in this case absent some important distinction between the situation there and the situation in Alabama in the present case.

As pointed out in Part I of this brief, the federal district court in *Pembaur* dismissed the county on the same reasoning proffered by the respondents in the present case, but the Sixth Court of Appeals reversed and this Court did not question that ruling. Moreover, it is quite inconsistent for the Eleventh Circuit in the present case to ignore this Court's adoption of the Sixth Circuit's reasoning in *Pembaur* and come out with a completely different result from that of the Sixth Circuit and

this Court when the relevant factors are identical. (The similarities between the facts in *Pembaur* and the present case are discussed more fully in pages 12-17 of petitioners' opening brief).

Indeed, the respondents here seem to concede that this Court and the Sixth Circuit were correct in holding that Ohio sheriffs are county policymakers in the area of law enforcement. As the respondents admit, "Ohio law . . . plainly treats sheriffs as county officials." Resp. br. at 30. Yet the respondents try to justify the Eleventh Circuit's ruling in the present case by alleging various distinctions between Ohio and Alabama law.

The points of Ohio law which the respondents contend are different from Alabama are set out at page 30, note 23 of their brief. The first -- that the office of sheriff has occasionally been described in Ohio case law as a county office -- is no different from Alabama. *See, e.g., Jefferson County v. Dockerty*, 30 So.2d 474, 477 (Ala. 1974) ("the sheriff of Jefferson County is undoubtedly a county officer"); *In re County Officers*, 143 So. 345 (Ala. 1932) (sheriffs are "strictly speaking, county officers" for purposes of 1912 constitutional amendment regarding salaries); *State ex rel. Martin v. Pratt*, 68 So. 255, 257 (Ala. 1915) ("a sheriff [is] the highest purely executive officer of a county"). Alabama law specifically confers upon sheriffs the duty to enforce the law "in their respective counties." Ala. Code, § 36-22-3(4). Moreover, as the Eleventh Circuit noted in the present case, any characterization of an Alabama sheriff as a state official rather than a county official is not controlling with respect to the issue at hand. Pet. App. 32a-33a, 5 F.3d at 1450.

The other points cited by the respondents, quite noticeably, are not the same points upon which the Sixth Circuit relied in *Pembaur* in holding that Ohio sheriffs set county law

enforcement policy. As explained at pages 12-13 of the petitioner's opening brief, the points considered relevant by the Sixth Circuit are the same in Alabama as in Ohio.

Instead, the respondents cite a number of other points. For example, they contend that Ohio's "counties are recognized as having law enforcement power," citing an Ohio Attorney General's opinion which they state allows "counties [to] join with towns to coordinate regional law enforcement efforts." Resp. br. 30 n.23, citing Op. Ohio Att'y Gen. 90-091. Actually, the Attorney General's opinion cited by the respondents simply states that, because county sheriffs have jurisdiction throughout their county -- including towns within the county -- the sheriffs may participate with municipal police departments in the county in creating a metropolitan narcotics unit and a joint crime lab. Of course, in Alabama, sheriffs also have jurisdiction throughout their counties, including towns within the counties, although we are aware of no decisions one way or the other regarding the creation of metropolitan narcotics units or crime labs within Alabama counties. However, this in no way suggests that Ohio sheriffs have closer policymaking ties to their counties than Alabama sheriffs, or that Alabama sheriffs have greater ties to statewide policy than Ohio sheriffs.

Next, the respondents cite the fact that Ohio law permits home rule and that chartered counties in Ohio may change the office of sheriff from an elected to an appointed one. Resp. br. 30 n.23. Of course, the Sixth Circuit's decision in *Pembaur*, as affirmed by this Court, relied upon Ohio law to the effect that sheriffs in Ohio generally are elected by the county's voters. 746 F.2d at 341. The fact that home rule may exist in some Ohio counties, and that chartered Ohio counties may change from election to appointment, does not seem to be of much importance in concluding that an Ohio sheriff makes county policy -- and certainly does not demonstrate, by contrast, that an

Alabama sheriff makes statewide rather than county policy. Indeed, if those were key distinctions, only Ohio sheriffs in home rule and chartered counties would be considered county policymakers and the rest would be considered state policymakers.

The respondents contend that "[i]n some instances," Ohio county boards fill sheriffs' vacancies. Resp. br. 30 n.23, *citing*, Ohio Rev. Code Ann. § 305.02. Actually, that statute provides that vacancies are filled by the county central committee of the political party which last held the office, unless the officeholder was an independent, in which case the county board fills the vacancy. Finally, the respondents cite an Ohio statute specifying that county boards review annual statements of various officers, including sheriffs. Resp. br. 30 n.23, *citing*, Ohio Rev. Code Ann. § 305.19. Of course, in Alabama, the sheriff is also required to file certain reports -- specifically, financial reports -- with the County Treasurer and with the County Commission. Ala. Code §§ 36-22-3(3), 36-22-6, pet. app. 74a-76a. Again, these distinctions -- if they are, in fact, distinctions -- do not prove that Ohio sheriffs set county policy while Alabama sheriffs set statewide policy.

In summary, none of the points cited by the respondents seem to distinguish, in any important way, sheriffs in Alabama from sheriffs in Ohio in terms of whether they make policy for the county or the state. Given the respondents' concession that "Ohio law . . . plainly treats sheriffs as county officials," resp. br. 30, it follows that Alabama sheriffs also make policy for the county in the area of law enforcement.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the decision of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully Submitted,

ROBERT B. McDUFF*
771 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

CARLOS A. WILLIAMS
Post Office Box 306
Mobile, Alabama 36601
(205) 434-2478

BRYAN STEVENSON
BERNARD HARCOURT
114 North Hull Street
Montgomery, Alabama 36104
(205) 269-1803

Counsel for Petitioners
* Counsel of Record

(4)

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FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

BETH S. BRINKMANN
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
LINDA F. THOME
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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26 pp

QUESTION PRESENTED

Whether the sheriff of Chambers County, Alabama, is a final policymaker for the county in matters of law enforcement for purposes of county liability under 42 U.S.C. 1983.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Constitution and statutes: Page

In the Supreme Court of the United States

OCTOBER TERM, 1994

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INTEREST OF THE UNITED STATES

The statute the Court is called upon to construe in this case—42 U.S.C. 1983—is the basic federal statute providing civil remedies for deprivations of federal rights by state and local officials. The United States has a strong interest in ensuring that this statute is interpreted with adequate breadth to serve its intended purpose. Private parties suing under Section 1983 to enforce federal rights "act not only on their own behalf, but also 'as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.'" Cf. *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972). In addition, the United States, acting through the

Department of Justice, has been given a direct role in the enforcement of Fourteenth Amendment rights. As an important participant in civil rights enforcement, the government has an interest in the effectiveness of the entire congressional plan.

STATEMENT

This case arises out of two law enforcement raids on the Capri Club, a nightclub located in Chambers County, Alabama.[1] Pet. App. 3a. Petitioners are the two owners of the Club, each of whom was present during one of the raids, an employee of the Club who was present during both raids, and a patron of the Club who was present during the second raid. Pet. App. 45a, 52a-53a.

The first raid occurred on December 14, 1990. It was based on the recommendation of a Chamber County Sheriff's investigator who had participated in a preliminary investigation by the sheriff's department of alleged narcotics transactions at the Club. Pet. App. 4a. That investigation had been prompted by complaints to the sheriff's department of drug transactions at the Club. The Chambers County Sheriff "approved the narcotics investigation and operation at the Club." *Ibid.* The sheriff's investigator apparently devised the plan for the raid. *Ibid.* No warrant to search the Club or to seize or arrest any of its occupants was obtained. Pet. App. 19a.

An undercover officer and a confidential informant entered the Club on December 14, and the officer purchased marijuana and cocaine from a patron at the club. After the transaction, the officer left the Club and signaled to other officers, who had been watching, to begin the raid. Pet. App. 4a-5a.

[1] The case comes to the Court from the court of appeals' ruling on respondent's pretrial motion for summary judgment. Thus, the record does not contain findings of fact and this statement is based on the facts as alleged by petitioners and relied on by the courts below.

A S.W.A.T. team entered first. They were dressed in black, some members wore ski masks and they carried shotguns. Pet. App. 47a. After the team entered, approximately 20 to 30 additional law enforcement officers followed.[2] Within minutes of the entry, the officers identified and arrested the person who had sold the narcotics to the undercover officer. The only other person arrested during the raid was that person's brother, a minor, who possessed some of the marked money used by the undercover officer to buy the narcotics. Pet. App. 5a-6a. The officers nonetheless proceeded to search throughout the club, including the cash register, door receipts and liquor, and to detain dozens of citizens at gunpoint for an extended period of time. Pet. App. 5a, 17a. They seized some currency and some illegal liquor.

During the course of the raid, the officers pointed their guns at petitioners Tony Spradley and Drecilla James and other people in the club. The officers prohibited the people in the club from moving or leaving until the raid was over—a period of approximately one to one and one-half hours. Pet. App. 5a. When one patron asked to go to the restroom, an

[2] Participating in the raid were members of the Chambers County Drug Task Force, including 30 to 40 officers from the Chambers County Sheriff's Department, the police departments of the Cities of Wadley, Lafayette, Lanett, and Valley, Alabama, and an employee of the Alabama Alcoholic Beverage Control Board. Pet. App. 2a, 4a, 47a. The Chambers County Sheriff deputized officers from outside the county so that they could participate. Pet. App. 7a, 49a.

officer told him to "Shut up, or I'll shut you up myself." *Ibid.* When petitioner James stated that she was so scared that she had to go to the restroom, she was told "no" by one officer. When she asked another officer for permission to use the Club restroom facilities, that officer told her that she would have to go behind the building. *Ibid.*

The Chambers County Sheriff did not personally participate in the raid, but was debriefed following the first raid as to how the raid had been conducted. Pet. App. 23a. The Chambers County Sheriff's Department received additional narcotics-related complaints after the December 14 raid. The sheriff directed the sheriff's investigator to determine whether a second operation was required. The investigator recommended another operation and the Chambers County Sheriff authorized it. Pet. App. 6a. Again, no search or arrest warrants were obtained prior to the raid.

The second raid was conducted on March 29, 1991. The procedure followed was similar to that followed during the December 14 raid. This time the law enforcement officers chambered rounds of ammunition into their firearms, pointed them at people in the club and ordered them to get down on the floor. The officials searched some of the people in the Club, including petitioner Jerome Lewis. During their search of Lewis, law enforcement officials pushed him outside the Club and shoved him against a wall. Pet. App. 6a. After Lewis was searched, the officials forced him to go back into the Club until after the raid was concluded. At one point, an officer, "with his finger on the trigger, pointed a shotgun at Lewis' face." *Ibid.* The law enforcement officials pushed another patron off a bar stool. The officials

held guns on some of the employees, including petitioner James. This raid also lasted from one to one and one-half hours. The officials made no arrests during or as a result of this raid. *Ibid.* During one of the two raids, an officer said that they would keep coming back until the Club was closed. Pet. App. 7a.

Petitioners brought this action in federal district court seeking declaratory, injunctive and compensatory relief. The complaint included both state and federal causes of action, and raised claims under 42 U.S.C. 1983, alleging that respondents had violated petitioners' rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments. Pet. App. 7a, 46a & n.1. Petitioners contended that the raids were racially motivated and were not supported by either an arrest warrant or a search warrant. Pet. App. 46a. The defendants named below were the Sheriff of Chambers County, the Chambers County Commission, the City of Wadley, the Police Chief of Wadley, and an individual Wadley police officer. Pet. App. 1a. All the petitioners are black and all the defendants are white. The defendants filed motions to dismiss and for summary judgment which the district court granted in part and denied in part.

The issue presented for this Court's review is the ruling on the Chambers County Commission's motion for summary judgment. The district court denied that motion. It concluded that the county government was not entitled to summary judgment because the sheriff "as the chief law enforcement officer for the county, may have been the final policy maker for the County in making his decision to approve the allegedly illegal raids." Pet. App. 67a, citing *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 481-484 & n.10 (1986); and *Parker* v. *Williams*, 862 F.2d 1471, 1477-

1481 (11th Cir. 1989). The court noted that under Alabama Code § 36-22-3(4) (1991), the county sheriff had to deputize officials from outside the county before they could participate in the raid, that the sheriff's duty is to ferret out crime and apprehend and arrest criminals in the county, and that the county commission must furnish him with the equipment necessary for that purpose. *Id.* § 36-22-18. The court also concluded that although the sheriff is a state employee, the sheriff "may have been the final decision-maker for the County in ferreting out crime." Pet. App. 67a, citing *Parker* v. *Williams*, 862 F.2d at 1475.[3]

In its ruling on the defendants' motions to reconsider, the district court further stated that whether the sheriff was the final policy maker for the county was a question of law and thus far it had determined

[3] In *Parker* v. *Williams*, the Eleventh Circuit certified to the Alabama Supreme Court the question whether a county sheriff may be considered a county employee "for purposes of imposing liability on the county under a theory of respondeat superior." 862 F.2d at 1474. The state court answered the question in the negative. *Ibid.*; *Parker* v. *Amerson*, 519 So. 2d 442 (Ala. 1987). The court explained that the state constitution placed sheriffs in the "executive department" thereby rendering them officers of the state. *Parker* v. *Amerson*, 519 So. 2d at 443. Based on that ruling and the state court's analysis of other provisions of state law, the Eleventh Circuit held in *Parker* v. *Williams*, that the state law claims against the sheriff and county were barred. For purposes of the Section 1983 action against the county in *Parker* v. *Williams*, however, the Eleventh Circuit found that the label of "state official" was not dispositive and it held that the county was liable for the sheriff's actions because he was exercising county power with final authority. 862 F.2d at 1478-1479.

that the "[p]laintiffs had come forward with sufficient evidence to persuade this Court that Sheriff Morgan may be the final policy maker for the County. The parties will have an opportunity to convince this Court that Sheriff Morgan was or was not the final policy maker for the County, and the Court will make a ruling as a matter of law on that issue before the case goes to the jury." Pet. App. 72a.

The court of appeals reversed. See Pet. App. 1a-40a.[4] The court acknowledged that the county government "may be subjected to § 1983 liability * * * for the acts of an official who 'possesses final authority to establish municipal policy with respect to the action ordered.' " Pet. App. 31a, quoting *Pembaur*, 475 U.S. at 481. As had the district court, the court of appeals noted that the Alabama Supreme Court had held that "[a] sheriff is not an employee of a county for purposes of imposing liability on the county under a theory of respondeat superior." Pet. App. 32a, quoting *Parker* v. *Amerson*, 519 So. 2d 442, 442 (Ala. 1987); see note 3, *supra*. The court of appeals acknowledged, however, in agreement with the district court, that that holding, in the context of a respondeat superior ruling, was not dispositive on the question of the county's Section 1983 liability. The court of appeals stated, "the fact that an Alabama sheriff 'works' for the state does not

[4] The case is before the Court as an interlocutory appeal because certain individual defendants appealed the denial of their motions for summary judgment on qualified immunity grounds. The court of appeals exercised jurisdiction over the appeal pursuant to *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), and exercised its pendent jurisdiction over the County Commission's interlocutory appeal of the summary judgment ruling. Pet. App. 28a-31a.

answer the question of whose policy he implements when he takes action." Pet. App. 33a, citing *Parker* v. *Williams*, 862 F.2d at 1478. Section 1983 liability, the court of appeals held, depends on whether the sheriff " 'was exercising county power with final authority' when he authorized the law enforcement raids in this case." Pet. App. 33a, quoting *Parker* v. *Williams*, 862 F.2d at 1478.

The court of appeals then proceeded to reverse the district court's denial of the county's summary judgment motion, not because the sheriff failed to meet the criteria for exercising final policymaking authority, however, but because of the court's conclusion that Alabama counties have no law enforcement authority. Pet. App. 33a. The court reached this conclusion based on one state statutory provision specifically imposing such authority on sheriffs and the fact that the court was not presented with any state statute or decision specifying that Alabama counties and their governing commissions have law enforcement authority or duties. *Ibid.* The court concluded that "because the State has not assigned the counties any law enforcement authority, the sheriff is not exercising county power when he authorizes a raid on suspected criminal activity within his county." Pet. App. 33a-34a.

SUMMARY OF ARGUMENT

The court of appeals erred in ruling that the Chambers County Commission could not be held liable for unconstitutional law enforcement practices of the county's sheriff. Local government entities are liable, under Section 1983, for unconstitutional conduct of officials of the entity who have final policymaking authority over the subject matter in question. *Pembaur* v. *City of Cincinnati*, 475 U.S. at 483-484 (plurality opinion). To determine where policymaking authority lies for these purposes, a trial court must look to state and local statutory and decisional law, as well as to custom or usage having the force of law, and identify the officials or government bodies that have final policymaking authority in regard to the particular action challenged. *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. 701, 737 (1989); *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988) (plurality opinion). Review of Alabama law demonstrates that the Chambers County Sheriff has that policymaking authority in regard to the county law enforcement activities challenged by petitioners. Because the county is required by state law to pay the sheriff and to fund all the operations of the sheriff's office, it is also clear that the county government is properly viewed as having authority in regard to county law enforcement activities for purposes of Section 1983. The court of appeals therefore erred in concluding that the county could not be held liable for the sheriff's unconstitutional exercise of his authority in this case.

ARGUMENT

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE COUNTY GOVERNMENT WAS ENTITLED TO SUMMARY JUDGMENT

A. Counties and other local governmental units are liable under 42 U.S.C. 1983 when they commit a constitutional tort through unconstitutional action by an official of the unit who has final authority by virtue of state law or custom to establish the governmental unit's policy with regard to the action challenged

Local governmental bodies are "included among those persons to whom § 1983 applies." *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658, 690 (1978).[5] Local governments therefore may be sued under Section 1983 for monetary, declaratory or injunctive relief when they commit a constitutional tort. *Ibid.* A local government is liable only when it has committed the constitutional violation, however, and not merely because one of its employees commits such a violation. *Pembaur* v. *City of Cincinnati*, 475 U.S. at 478-479. The Court has emphasized that a government is responsible under Section 1983 when the injury alleged is inflicted by "execution of [the] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy[.]"

[5] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. * * *

Monell, 436 U.S. at 694. A government may be liable for a single decision by an official if the official is "the official or [one of the] officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur*, 475 U.S. at 483-484 (plurality opinion). An official can derive his authority to make final policy decisions from legislation, from formal delegation from another official or entity, or from custom or usage. See, *Praprotnik*, 485 U.S. at 124 & n.1.

Two decisions of the Court since *Pembaur* have described the method by which a court should determine whether final authority to make municipal policy is vested in a particular official. In *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. 701, 737 (1989), a majority of the Court reaffirmed the analysis set forth in the earlier plurality opinion in *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 125 (1988). In *Praprotnik*, the Court "attempted a clarification of tools a federal court should employ in determining where policymaking authority lies for purposes of § 1983." *Jett*, 491 U.S. at 737. The Court there reaffirmed that the matter is a question of state law to be determined by the trial court before a case is submitted to the jury. *Ibid.* The trial court must review "the relevant legal materials, including state and local positive law, as well as 'custom or usage having the force of law,'" and thereby "identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *Ibid.*, quoting in part *Praprotnik*, 485 U.S. at 124 n.1. Once that identification is made, the factfinder must determine whether the decisions

of the policymaking authority caused the deprivation of rights at issue either by commanding that action occur or by acquiescing in a longstanding practice or custom of the local government. *Jett*, 491 U.S. at 737.

B. Examination of relevant state law demonstrates that the Chambers County Sheriff had final policymaking authority concerning the county law enforcement activities alleged to have caused the constitutional violations in this case

The court of appeals incorrectly applied the *Jett* and *Praprotnik* standard in determining who speaks with final policymaking authority for Chambers County concerning county law enforcement activities. The court of appeals correctly cited those cases as requiring it to look to state law to resolve the issue. Pet. App. 32a. The court did not fully examine relevant state statutes and practices, however, and instead focused on one state statutory provision imposing law enforcement duties on sheriffs (Ala. Code § 36-22-3(4) (1991)). The court concluded that, because there is no similar state statute or decision expressly imposing specified law enforcement duties on counties, the county did not have any law enforcement duties or authority. The court reasoned that the county therefore was not in a law enforcement "partnership" with the sheriff and not liable for the sheriff's law enforcement actions under Section 1983. Pet. App. 33a.

In reaching this conclusion, the court of appeals relied on its prior decision in *Parker* v. *Williams*, 862 F.2d 1471, 1478 (1989). In that case, the court of appeals had conducted a broad review of state law along the lines suggested by *Praprotnik* and *Jett*, and concluded that the county *was* liable for an Alabama

sheriff's actions in running the county jail and in related hiring decisions. The court of appeals acknowledged that in *Parker* v. *Williams*, it had held that the Alabama Supreme Court's ruling that an Alabama sheriff is not an employee of the county "for purposes of imposing liability on the county under a theory of respondeat superior," is not dispositive of the issue of final policymaking authority for purposes of Section 1983 liability. Pet. App. 32a, quoting *Parker* v. *Amerson*, 519 So. 2d at 442; see note 3, *supra*. The court of appeals noted that in *Parker* v. *Williams*, it had held that "the fact that an Alabama sheriff 'works' for the state does not answer the question of whose policy he implements when he takes action." Pet. App. 33a. As the court of appeals recognized, "*Parker* teaches that '[t]he pivotal point is whether [the sheriff] was exercising county power with final authority.'" *Ibid.* Such an analysis in the present case demonstrates that Alabama law imposes on counties authority over and responsibilities for law enforcement similar to the authority and responsibilities present in *Parker* v. *Williams*, and that state law gives the county sheriff final policymaking authority in regard to county law enforcement practices.

1. Under Alabama law, counties have duties and responsibilities in regard to law enforcement by the county sheriff

Alabama law clearly places the financial responsibility for a county sheriff's law enforcement activities on the county government. Under Alabama law, a county is thus obligated to compensate the county's sheriff by a designated annual salary paid "out of the county treasury as the salaries of other county

employees are paid." Ala. Code § 36-22-16(a) (1991). Cf. *Parker* v. *Williams*, 862 F.2d at 1479 (county must appropriate funds for maintenance of jail). Not only does state law thus expressly characterize the sheriff as a county employee, it makes clear that the county must financially support its sheriff and has the authority to provide a higher salary "by law by general or local act." Ala. Code § 36-22-16(a) (1991). Alabama law also compels the county commission to "furnish the sheriff with the necessary quarters, books, stationery, office equipment, supplies, postage and other conveniences and equipment, including automobiles and necessary repairs, maintenance and all expenses incidental thereto, as are reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office." *Id.* § 36-22-18. State law further compels the county to pay for any special investigations by the sheriff and requires the county to audit the sheriff's request for such funding. *Id.* § 36-22-6(a). In addition, state law authorizes the county commission to pay from the county's general fund "all dues, fees and expenses of the sheriffs * * * that are incurred by such individuals through membership in and/or attendance at official functions of their state organizations," and its sheriff's membership dues in state and national sheriffs' associations. *Id.* §§ 11-1-11, 36-22-19.[6]

With respect to revenues, Alabama law provides that the county commission is to collect various fees

[6] In addition to being compelled to pay the salary of the sheriff and to fund fully all the necessary expenses of the operations of the sheriff's office, certain counties are required by state law to administer a retirement system for the sheriff through the county general fund. See Ala. Code §§ 36-22-40 to 36-22-45 (1991).

and commissions that were previously collectible "for the use of the sheriff and his deputies," and pay them into the county's general fund. Ala. Code § 36-22-17 (1991). The county commission also has the authority to direct that the sheriff pay to the county's general fund the amounts received for feeding prisoners, which the sheriff is entitled to retain absent such direction by the county commission. *Ibid.* The sheriff must render to the county treasury or custodian of county funds a periodic written statement of the moneys received by him for the county. *Id.* § 36-22-3(3).

Alabama law also provides that the county voters elect the sheriff, Ala. Const. Art. V, § 138. Those voters thus have the ultimate capacity to control the sheriff's activities. See *Parker* v. *Williams*, 862 F.2d at 1481 n.10. In addition, citizens of the county have direct authority to require that the county sheriff make an investigation and report regarding any alleged violations of the law in the county. Ala. Code § 36-22-6(b) (1991). Under this provision, 25 reputable county citizens may sign a written request to that effect and submit it to the district attorney for the county, who must then direct the sheriff to make such an investigation and report. *Ibid.*

2. Under Alabama law, the county sheriff exercises final policymaking authority in regard to county law enforcement activities

With regard to the exercise of authority, Alabama law clearly makes the county sheriff the final policymaking authority over law enforcement within his county. Alabama law specifies that "[i]t shall be the duty of sheriffs in their respective counties, by themselves or deputies, to ferret out crime, to appre-

hend and arrest criminals and, insofar as within their power, to secure evidence of crimes in their counties and to present a report of the evidence so secured to the district attorney or assistant district attorney for the county." Ala. Code § 36-22-3(4) (1991). An Alabama county sheriff has no authority to enforce the law outside of his county, nor does state law identify any other official or entity as authorized to make final policymaking decisions in regard to law enforcement in a particular county.

C. Recognizing that Alabama sheriffs are final policymakers for the county in regard to law enforcement actions is consistent with this Court's decision in *Pembaur* and the rulings by other courts of appeals

In *Pembaur* v. *City of Cincinnati*, 475 U.S. at 483-484 (plurality opinion), the Court noted that a county sheriff's decisions in regard to law enforcement practices generally would give rise to county liability because in that area the sheriff "*is* the official policymaker." 475 U.S. at 483 n.12. The Court approved of the court of appeals' conclusion in *Pembaur* that, under Ohio law, the county sheriff and the prosecutor established county policy in regard to law enforcement practices. *Id.* at 484-485. In reaching that conclusion, the court of appeals in *Pembaur* had relied on facts strikingly similar to the facts in the instant case. See *Pembaur* v. *City of Cincinnati*, 746 F.2d 337, 341 (6th Cir. 1984) (citing fact that county residents elect sheriff, county pays sheriff's salary and provides budget for sheriff's office, county provides sheriff with equipment and office necessities, and that sheriffs serve as chief law enforcement officers in each county). The Chambers County Sheriff similarly should be deemed to have final policymaking

authority for the county in regard to law enforcement practices so that the county is liable for the unconstitutional exercise of such authority by the sheriff.

The First, Fifth, and Ninth Circuits have reached the same conclusion after examining similar statutory schemes in other states. As the First Circuit wrote in *Blackburn* v. *Snow*, 771 F.2d 556, 571 (1985), where the sheriff is "the county official who was elected by the County's voters to act for them and to exercise the powers created by state law," the county is liable under Section 1983 for the sheriff's misconduct. See also *Crane* v. *Texas*, 766 F.2d 193, 195 (5th Cir. 1985) (per curiam) (Texas county may be held liable for the actions of its district attorney where, "much like the county itself, his office is a local entity, created by the State of Texas and deriving its powers from those of the State, but limited in the exercise of those powers to the county, filled by its voters, and paid for with its funds"), cert. denied, 474 U.S. 1020 (1985); *Gobel* v. *Maricopa County*, 867 F.2d 1201, 1208-1209 (9th Cir. 1989) (Arizona county attorney who is elected by county voters may be final policymaker for the county for purposes of establishing county liability). See also, *Turner* v. *Upton County*, 915 F.2d 133 (5th Cir. 1990), cert. denied, 498 U.S. 1069 (1991); *Crowder* v. *Sinyard*, 884 F.2d 804 (5th Cir. 1989), cert. denied, 496 U.S. 924 (1990); *Dotson* v. *Chester*, 937 F.2d 920, 924-932 (4th Cir. 1991). *Lucas* v. *O'Loughlin*, 831 F.2d 232 (11th Cir. 1987), cert. denied, 485 U.S. 1035 (1988).

The contrary ruling by the Seventh Circuit is not persuasive. In *Thompson* v. *Duke*, 882 F.2d 1180, 1187 (1989), cert. denied, 495 U.S. 929 (1990), the

Seventh Circuit held that an Illinois county could not be held liable for the misconduct of its sheriff in his administration of the county jail, because the county board had no independent authority over the jail and "[t]he Sheriff is an independently-elected constitutional officer who answers only to the electorate, not to the Cook County Board of Commissioners." This ruling confuses the question whether a local official has been delegated policymaking authority by another entity (such as the county board), with the question whether the official has obtained that authority without delegation by statutory provision or custom. See *Pembaur*, 475 U.S. at 483. Where an officer has policymaking authority for a governmental entity by virtue of his office and the powers and duties assigned to that office by state law, he is a final policymaker for purposes of Section 1983 liability of the entity without regard to whether he shares that authority with any other official or entity. See *Blackburn*, 771 F.2d at 571 (county liable for sheriff's actions without regard to whether other officials were involved, or whether other officials failed properly to oversee sheriff).[7]

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[7] The reasoning by the court of appeals below also appears to reflect some confusion in regard to the means by which the sheriff could be vested with final policymaking authority for the county. The court of appeals' decision relies solely on the fact that there is no express state statute or decision denoting the county as a law enforcement authority. This Court has made clear, however, that consideration of state statutory and decisional law does not end the matter and that a court must also consider state custom and usage regarding the locus of county policymaking authority. *Jett*, 491 U.S. at 737.

Indeed, the court of appeals recognized the necessity of considering state custom and usage in regard to the city's appeal of its summary judgment motion in which it claimed that the police chief was not the final decisionmaker for city law enforcement. In declining to exercise pendent jurisdiction because of the state of the record, the court explained that to "identify those individuals whose decisions represent the official policy of the local governmental unit," the trial court should examine not only the "relevant positive law, including ordinances, rules and regulations, *but also the relevant customs and practices having the force of law.*" Pet. App. 37a, quoting *Mandel* v. *Doe*, 888 F.2d 783, 793 (11th Cir. 1989).

Thus, even if the court of appeals' interpretation of state statutory law had been correct, summary judgment in favor of the county defendants would not have been appropriate because remand to the trial court would have been required for consideration of state custom and usage. Cf. Pet. App. 72a (district court emphasizing that its ruling on whether sheriff is final policy maker for county was based on the plaintiffs' evidence thus far, but that the parties would have an opportunity to address the issue again before the case went to the jury).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

BETH S. BRINKMANN
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
LINDA F. THOME
Attorneys

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No. 93-1636

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

TOM SWINT, *et al.*,
Petitioners,

v.

CHAMBERS COUNTY COMMISSION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for
the Eleventh Circuit

BRIEF AMICI CURIAE SUPPORTING PETITIONERS OF AMERICAN CIVIL LIBERTIES UNION, ACLU OF ALABAMA, AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Steven R. Shapiro
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, NY 10036

Michael A. Cooper, Co-chair
Herbert J. Hansell, Co-chair
Norman Redlich, Trustee
Barbara R. Arwine
Thomas J. Henderson
Sharon R. Vinick
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1450 G Street, N.W., Suite 400
Washington, D.C. 20005

Mitchell F. Dolin
Robert A. Long, Jr.
T. Jeremy Gunn*
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Post Office Box 7566
Washington, D.C. 20044-7566
(202) 662-6000

Counsel for *Amici Curiae*

*Counsel of Record

40pp

QUESTION PRESENTED

Whether the sheriff of a county is a final policymaker for the county in matters of law enforcement for purposes of county liability under 42 U.S.C. § 1983.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

MISCELLANEOUS

IN THE SUPREME COURT OF THE UNITED STATES

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The American Civil Liberties Union, the ACLU of Alabama, and the Lawyers' Committee for Civil Rights Under Law respectfully submit this brief *amici curiae* in support of petitioners. Pursuant to Rule 37, all parties before this Court have consented to the filing of this brief.

INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to preserving and defending constitutional rights. The ACLU of Alabama is one of its state affiliates. The ACLU has appeared before this Court on numerous occasions, both as counsel for parties and as *amicus curiae*. Because the

decision below would substantially curtail the ability of many individuals to obtain meaningful relief for violations of their constitutional rights by law enforcement officials, this case raises issues of significant concern to the ACLU and its members.

The Lawyers' Committee for Civil Rights Under Law is a national civil rights organization that was formed in 1963 by leaders of the American bar at the request of President Kennedy to provide legal representation to African-Americans who were being deprived of their civil rights. The Lawyers' Committee and its local affiliates have represented thousands of individuals who have brought claims against municipalities under 42 U.S.C. § 1983. Section 1983 is the primary vehicle for the enforcement of the constitutional protection of Equal Protection and Due Process with regard to state and local governments, including deprivations and injuries caused by discrimination on the basis of race, national origin, and gender. A decision affirming the court of appeals ruling could profoundly limit the availability of damage remedies under Section 1983 and the accountability of local governments for constitutional violations.

STATEMENT OF THE CASE

Petitioners are the owners and patrons of the Capri Club, a night spot in Chambers County, Alabama. The owners and most Capri Club patrons are African-Americans. Pet. App. 4a, 54a.

In late 1990 and early 1991, several dozen local law enforcement officials conducted two raids on the Capri Club. The plans for the two raids were similar. In both instances, Sheriff James Morgan of Chambers County authorized a consortium of local law enforcement officials to surround the Capri Club. Pet. App. 49a. An undercover officer was sent inside to attempt an illegal-drug purchase. Once the purchase was made, the police stormed the club and held the clientele at gunpoint for between one and two hours. Pet. App. 5a, 6a.

The first raid was on December 14, 1990. The undercover officer made a small drug purchase from one customer at the club. Rather than arresting the seller, the officer immediately left and signaled to other officers waiting outside. Moments later eight officers dressed in black and wearing ski masks burst inside. Pet. App. 52a. They pointed shotguns at the patrons and ordered them to "hit the floor." Pet. App. 52a-53a. Approximately thirty armed and uniformed police officers followed immediately afterward. The customer who sold the drugs to the undercover officer was then identified and arrested. But the officers also searched the cash register and door receipts, confiscated cash, and detained the patrons at gunpoint. Pet. App. 52a. Despite the wide-ranging investigation, no evidence of any additional illegal activity was discovered. Pet. App. 5a.

Three months later, on March 29, 1991, law enforcement officials conducted their second raid after again sending in an undercover officer who claimed to have made a drug purchase. Pointing their weapons at the club's customers, the officers ordered them to get down on the floor. One officer pushed a

patron off a bar stool. Pet. App. 6a. Another officer pointed his shotgun in a patron's face while his finger was on the trigger. Pet. App. 6a. A group of officers took one of the petitioners outside the club alone. They pushed him and threw him against a wall and searched him. Pet. App. 53a. Although the officers searched most of the patrons, nothing illegal was found. No arrests were made, and the undercover officer was unable to identify the person from whom he claimed to have purchased drugs. Pet. App. 6a.

As the law enforcement officials were leaving, one unidentified officer told a petitioner that the police would keep coming back until the Capri Club was finally shut down. No other nightclub in Chambers County was similarly raided during the twenty-one years in which Mr. Morgan has been County Sheriff. Pet. App. 7a.

Petitioners allege that the raids and the harassment of the Capri Club clientele violated their constitutional rights. They brought suit under 42 U.S.C. § 1983, making claims against Chambers County and against Sheriff Morgan and other officers in both their official and individual capacities.

SUMMARY OF ARGUMENT

The court of appeals decided that Chambers County, Alabama, lacks any "general law enforcement authority." Pet. App. 34a. Because the County has no law enforcement authority, the court reasoned, it was impossible for Sheriff James Morgan to be the final law enforcement official of the County. *Id.* By so holding, the court effectively immunized Chambers County from the consequences of Sheriff Morgan's actions.

The court of appeals was able to reach its conclusion only by ignoring the county-based law enforcement scheme that is clearly established under Alabama law. Although the court of appeals held that state law provides instruction on the scope of Section 1983 liability, it failed to consider Alabama law in any detail or to analyze whether county sheriffs actually function as state or county officials. When Alabama law is examined with respect to its system of law enforcement, it is clear that Chambers County provides law enforcement for the county and that Sheriff Morgan is the final policymaker for law enforcement in that county.

ARGUMENT

I. ALABAMA COUNTIES EXERCISE LAW ENFORCEMENT AUTHORITY AND COUNTY SHERIFFS ARE FINAL POLICYMAKING AUTHORITIES FOR LAW ENFORCEMENT IN THE COUNTIES.

The court of appeals held below that Chambers County lacks any "general law enforcement authority." Pet. App. 34a.[1/] Because the County has no such authority, the court reasoned, Sheriff Morgan could not be a final policymaker for the County. *Id.* Having reached these conclusions, the court of appeals held that the Chambers County Commission was not liable under 42 U.S.C. § 1983. *Id.*

The court of appeals erred by failing to examine the actual role and function of counties and county sheriffs under Alabama law. Rather than conducting a searching inquiry into Alabama law, as this Court has advised the lower courts, *see Elder v. Holloway*, 114 S. Ct. 1019, 1023 (1994),[2/] the court of appeals

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[1/] We hold that Sheriff Morgan is not the final repository of Chambers County's general law enforcement authority, *because* it has none. Therefore, the county commission is not liable for the Sheriff's law enforcement actions under 42 U.S.C. § 1983, and it is entitled to summary judgment on the § 1983 claims.

Pet. App. 34a (emphasis added). The respondent concurs: "Under Alabama law, there is no such thing as county law enforcement authority." Br. in Opp. 13.

[2/] In *Elder v. Holloway*, this Court unanimously held that a court of appeals, in a Section 1983 qualified immunity case, should "use its 'full knowledge'" of relevant law. *Id.* (quoting *Davis v. Scherer*, 468 U.S. 183, 192 n.9 (1984)) (holding court of appeals failed to consider relevant precedent).

panel incorrectly concluded that petitioners had not cited sufficient authority.[3/]

Counties and municipalities are liable under Section 1983 for the acts of an official, including a law enforcement official, whose "acts may fairly be said to represent official policy" for that county or municipality. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978).[4/] A thorough examination of Alabama law, which the court of appeals failed to undertake, clearly demonstrates that counties are integrally involved in the provision of law enforcement and that sheriffs are the policymakers who direct and manage county law enforcement activities.

A. In Alabama, State Law Enforcement Is Performed By The State Highway Patrol And County Law Enforcement Is Performed By The County Sheriff.

Although a state could establish a law enforcement system where state law enforcement officials would work on the county level, Alabama has chosen not to do so. Rather, Alabama has established a system in which local law enforcement functions are carried out at the county level by officials who are elected and paid by the county. In fact, Alabama law itself clearly

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[3/] The panel incorrectly stated that "[p]laintiffs have not cited us to any statutes or decisions indicating that Alabama counties, and their governing commissions, have law enforcement authority or duties." Pet. App. 33a. Petitioners here, plaintiffs and appellants below, did cite relevant portions of Alabama law. *See* Appellants' Op. Br. at 33-34, *Swint v. City of Wadley*, 5 F.3d 1435 (11th Cir. 1993) (No. 92-6574), *cert. granted*, 114 S. Ct. 2671 (1994).

[4/] "The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, but does not extend to counties and similar municipal corporations." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

differentiates between state law enforcement authority, which is exercised by the State Highway Patrol through its state troopers, and county law enforcement authority, which is conducted by county sheriffs. A review of this two-track Alabama law enforcement system reveals that the operations, expenses, and the obligations of the sheriff's office, including the salaries of the sheriff and all his employees, are paid by the county, and that all employees of the sheriff's office are county employees who are hired and fired by, and act at the direction of, the sheriff.

Selection and removal. The Alabama Code expressly empowers the state governor to "establish and maintain a state highway patrol." Ala. Code § 32-2-20 (1989).[5] The Highway Patrol reports to the Department of Public Safety, whose director is appointed by and "serve[s] at the pleasure of the governor." *Id.* § 32-2-1. The Director of Public Safety is in turn responsible for creating and administering the "highway patrol division" of the Department of Public Safety. *Id.* § 32-2-3. The State Director of Public Safety appoints not only the Chief of the Highway Patrol, but "all other employees," *id.* § 32-2-4, including the state troopers who exercise the full powers of police officials throughout the state. *Id.* § 32-2-22.

The State Director of Public Safety has no power, however, to appoint a sheriff or any personnel in a sheriff's office. Instead, the sheriff is "elected in each county, by the qualified electors thereof . . . ." Ala. Const. art. V, § 138. No state official, including the Governor and the Attorney General, has the power to appoint, instruct, discipline, or remove any sheriff. The only method for "disciplining" a sheriff is by judicial impeachment in the state Supreme Court, which can be instigated only by suit filed by the Attorney General. Ala. Const. art. VII,

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[5] The provisions of the Alabama Code and the Alabama Constitution cited herein are included in the Appendix to this brief.

§ 174.[6]

Jurisdiction. The jurisdiction of the State Highway Patrol is statewide and is coextensive with Alabama's borders. "Members of the state highway patrol . . . shall have the powers of peace officers in this state and may exercise such powers *anywhere within the state*." Ala. Code § 32-2-22 (emphasis added).

County sheriffs and the law enforcement personnel they direct, however, have no jurisdiction to enforce the law outside of their respective counties. Thus, Alabama law expressly provides that:

> It shall be the duty of sheriffs *in their respective counties*, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes *in their counties* and to present a report of the evidence so secured to the district attorney or assistant district attorney *for the county*.

Id. § 36-22-3 (emphasis added). No statute provides sheriffs, deputies, or the personnel that the sheriffs direct, with any general authority to enforce the law *outside* the counties in which the sheriff is elected to serve.

Salaries and insurance. As state officials, the state troopers in the State Highway Patrol are paid out of the state treasury. *Id.*

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[6] Impeachment of a sheriff is "similar to a criminal trial," *Parker v. Amerson*, 519 So.2d 442, 444 n.1 (Ala. 1987). It differs from the impeachment of the Governor, which requires voting on articles of impeachment by the House of Representatives and a trial by the Senate. Ala. Const. art. VII, § 173.

§ 32-2-6. Moreover, they are insured by the state. *Id.* § 32-2-10.

Unlike state troopers, county sheriffs are paid directly by the county out of "the county treasury." *Id.* § 36-22-16. Counties also provide insurance for the sheriffs and their offices. *See, e.g., First Mercury Syndicate, Inc. v. Franklin County*, 623 So.2d 1075, 1075 (Ala. 1993) (county purchases professional liability insurance for sheriff).[7/] Even the Alabama Supreme Court, when considering the question whether county sheriffs are state officials with respect to their salaries, concluded that they are county officials. *Jefferson County v. Dockerty*, 30 So.2d 474, 477 (Ala. 1947) ("the sheriff of Jefferson County is *undoubtedly a county officer*") (emphasis added).[8/]

Respondent attempts to minimize the importance of county control over the sheriff's purse strings by noting that county sheriff salaries are regulated by statute — as if the mere fact of

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[7/] The record below does not, to our knowledge, reveal whether the Chambers County Commission and Sheriff Morgan are jointly insured. In light of the fact that the commission and sheriff were represented by common counsel below, it is reasonable to assume either (a) that they are jointly insured, or (b) that they do not perceive a conflict of interest between themselves.

[8/] Jefferson County was the first county in Alabama to pay sheriffs by salary rather than by commissions and fees. *Jefferson County v. Dockerty*, 30 So.2d at 476. This change came by way of a constitutional amendment, ratified in 1912, that provided for the "allowance[] or salaries to be charged or received by any county officer of Jefferson County . . . ." Ala. Const. amend. 2. When the state legislature asked the Supreme Court to provide an advisory opinion on the question whether a sheriff (and other local officials) were "county officers" within the meaning of the Second Amendment of the Alabama Constitution, the Supreme Court confirmed that "*they are, strictly speaking, county officers* as included in and dealt with in said amendment." *In re County Officers*, 143 So. 345, 345 (Ala. 1932) (emphasis added).

statutory regulation were evidence that the county sheriff is in fact a state official. Br. in Opp. 9. In making this argument, however, respondent fails to acknowledge that county commissioners' salaries are *also* regulated by statute,[9/] but no one could argue that county commissioners are "state officials."[10/]

Financing. The State of Alabama pays for the operations and equipment of the Highway Patrol. "[T]he necessary expenses and costs of necessary equipment are likewise to be paid by warrant drawn by the comptroller on the funds appropriated by the legislature . . . ." Ala. Code § 32-2-6.

The State, however, does not fund the county sheriff's office. Rather, the county commission is responsible not only for paying the sheriff's salary, but also for financing the entire operation of the county sheriff's office. By law, the county commission must

> furnish the sheriff with the necessary quarters, books, stationery, office equipment, supplies, postage and other conveniences and equipment, including automobiles and necessary repairs, maintenance and all expenses incidental thereto, as are reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office.

Id. § 36-22-18. When county commissions have failed to provide sufficient financial resources, they have been instructed

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[9/] *See* Ala. Code § 11-3-4.1 (minimum compensation of county commissioners).

[10/] *See, e.g., Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989).

by Alabama courts to do so. *See, e.g., Geneva County Comm'n v. Tice*, 578 So.2d 1070, 1071 n.3 (Ala. 1991) (sheriff may sue county commission when commission fails to fund sheriff's office adequately).

Personnel decisions. Alabama operates a State Personnel Board, which provides state employees with a mechanism to appeal adverse employment decisions. *See* Ala. Admin. Code, 670-1 (Supp. 1990). State highway department officials, for example, must petition the State Personnel Board for reinstatement decisions. *State Highway Dep't v. State Personnel Bd.*, 628 So.2d 878 (Ala. Civ. App. 1993).

By contrast, the sheriff's hiring and other personnel decisions are subject to review by the *County* Personnel Board. *See, e.g., Fields v. State ex rel. Jones*, 534 So.2d 615, 616-617 (Ala. Civ. App. 1987) (denial of deputy sheriff's medical leave); *Etowah County Personnel Bd. v. McDowell*, 437 So.2d 563, 563-564 (Ala. Civ. App. 1983) (termination of deputy sheriff for insubordination); *Freeman v. Purvis*, 400 So.2d 389, 390 (Ala. 1981) (merit bonus increases for sheriff's deputies reviewed by County Personnel Board).

Payment of court costs. In Alabama, the state pays court costs only for those law enforcement officers who, like state troopers, are part of the classified civil service of the state. *See* Ala. Code § 36-21-1.

Sheriffs and their employees are not part of the state civil service, but rather are part of the unclassified civil service of each county. *See* 1994 Ala. Pub. Act. 547. Thus, there is no statute that requires the State to pay damages for torts caused by sheriffs in their official capacities. County commissions pay all the bills of the county sheriff's department and are authorized by statue to cover the sheriff's costs in defending tort suits. Ala. Code § 11-1-9.

* * *

In light of these statutory and judicial mandates, it is perfectly obvious that Alabama counties exercise significant law enforcement functions and that sheriffs are final law enforcement policymaking authorities in the counties.[11/] The county elects the sheriff, pays the sheriff, pays the sheriff's deputies, and finances, and equips the sheriff's office. The State, on the other hand, neither finances nor supervises the sheriff's policies. Because sheriffs function as the counties' chief law enforcement officers, counties are accountable under Section 1983 for the sheriffs' unconstitutional actions.

B. It Is Clear That The Sheriff Is The Final Law Enforcement Policymaker Because No Person Outside the County Has Been Or Can Be Identified As The Final Law Enforcement Official For The County.

In holding that Chambers County exercises no "general law enforcement authority," the court of appeals implicitly suggests that law enforcement in the County is actually administered by the State. Although a state theoretically could administer all law enforcement activities in its counties, the court of appeals failed to determine whether such is actually the case in Alabama. The fact that Alabama has not established state control over county law enforcement is confirmed not only by Alabama law as discussed above, but by the absence of *any* state official outside

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11/ This legal understanding fully accords with the common understanding we all have concerning the role of a sheriff. *See American Heritage Dictionary of the English Language* 1663 (3d ed. 1992) (defining "sheriff" as the "chief law enforcement officer . . . in a U.S. county"); *Webster's New International Dictionary of the English Language* 2311 (2d unab. 1954) (defining "sheriff" as the "chief executive officer of a shire or county, charged with the execution of the laws, the serving of judicial writs and processes, and the preservation of the peace").

the county who has *any* control over the county sheriff's policies.

Under this Court's guidelines, the absence of any responsible party outside the county compels the conclusion that the county is liable for the sheriff's actions. This Court has previously ruled that the lower courts, through recourse to state law, should identify which officials are responsible for establishing policy in a particular area. As this Court has noted:

> we can be confident that state law (which may include valid local ordinances and regulations) *will always direct a court to some official or body that has the responsibility for making law or setting policy* in any given area of a local government's business.

St. Louis v. Praprotnik, 485 U.S. 112, 125 (1988) (plurality opinion) (emphasis added). If the county is not liable under Section 1983 for the sheriff's actions, that could only be because someone other than the sheriff or county is responsible for law enforcement matters.

Neither the court of appeals nor the respondent identified any official or body *outside* the county "that has the responsibility for making law or setting policy," *id.*, with respect to the action at issue here: Sheriff Morgan's authorization of the raids. In fact, the very Alabama scheme on which the court of appeals purports to rely identifies no state executive official with any responsibility for supervising or disciplining Sheriff Morgan. Neither the Governor, the Attorney General, the Director of Public Safety, nor any other person supervises his actions.

Absent a basis for concluding that the State in fact actually operates the county sheriffs' offices, counties must be held liable for the actions of the counties' chief law enforcement officers. There is no question that, under Alabama law and practice,

county sheriffs function as the final arbiters of law enforcement matters in their respective counties. Hence, the county government is liable for the sheriff's actions.

II. COUNTIES ARE LIABLE FOR THE OFFICIAL ACTS OF COUNTY SHERIFFS.

The Eleventh Circuit has previously held that Florida counties are liable for the official actions of county sheriffs. *Lucas v. O'Loughlin*, 831 F.2d 232 (11th Cir. 1987), *cert. denied*, 485 U.S. 1035 (1988). Unlike the panel deciding this case below, the Eleventh Circuit in *Lucas* carefully examined Florida's law enforcement structure. Rejecting the very arguments being made by respondent here, the *Lucas* court pointed to the factors making counties liable for the actions of their sheriffs. In an analysis that would apply equally to Alabama, the Eleventh Circuit held that a county was liable for the sheriff's actions because:

> His salary and that of his deputies were paid out of county funds. These salaries and the expenses of his office, including the operation and maintenance of the jail, were budgeted each year by the sheriff and submitted to the board of county commissioners . . . .
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> . . . . Although elected by virtue of state law, he was elected to serve the county as sheriff. In that capacity, he had absolute authority over the appointment and control of his deputies. His and their salaries were paid by local taxation and according to a budget approved by the county commissioners. We conclude, therefore, that his act was the act of [the] County. The trial court erred in dismissing the

county as a defendant.

Id. at 234, 235. If the court of appeals in its decision below had asked the same questions it posed in *Lucas*, it would have been compelled to conclude that sheriffs are final policymakers and that counties are liable for the sheriffs' actions. The court of appeals' conclusion below resulted in large measure from its failure to inquire into Alabama law.

Other courts of appeals follow the same line of reasoning the court of appeals applied in *Lucas*. The First Circuit, for example, found that a Massachusetts county was liable for a sheriff's Section 1983 violation "because the Sheriff was the county official who was elected by the County's voters to act for them and to exercise the powers created by state law." *Blackburn v. Snow*, 771 F.2d 556, 571 (1st Cir. 1985).

The Fifth Circuit has similarly construed Texas law where the county sheriff is directly elected by the citizens of the county. A popularly elected sheriff

> hold[s] virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein . . . . [H]is official conduct and decisions must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy' for which the county may be held responsible under section 1983.

Turner v. Upton County, 915 F.2d 133, 136 (5th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991) (quoting *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980) and *Monell v. Dep't of Social Servs.*, 436 U.S. at 694). The Sixth Circuit also held

the county liable for a sheriff's action, even though the state constitution explicitly provided that counties do "not make policy for the Sheriff's Department." *Marchese v. Lucas*, 758 F.2d 181, 188 (6th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987). In holding the county liable, the court pointed to how Michigan law functions:

> The County, through its Board of Supervisors, appropriates funds and establishes the budget for the Sheriff's Department. The Sheriff is elected by the voters of Wayne County. No doubt he is responsible for enforcing state law and presumably federal law as well. But equally clearly he is not an official of the State of Michigan or of the federal government.

Id., 758 F.2d at 189. Courts have thus held counties liable for sheriffs' actions where, as here, counties elect and finance the sheriffs.

Courts also hold counties liable for a sheriff's actions where the sheriff, as is also the case in Alabama, reports to no higher state or county official. The Fifth Circuit found, for example, that an Arkansas sheriff, who has a "statutory duty to perform law enforcement activities in and for the county, is solely responsible for the procedures and practices of the department; there is no legislative or other higher body, beyond a court of law, to which the sheriff answers." *Crowder v. Sinyard*, 884 F.2d 804, 828 (5th Cir. 1989), *cert. denied*, 496 U.S. 924 (1990) (citation omitted). In these circumstances, sheriffs are "final policymaking authorit[ies]" and counties are liable for their actions. *Id.* at 829.

In *Davis v. Mason County*, the Ninth Circuit held that a sheriff can be a "final authority" with respect to one policy, even if he or she is not the final authority with respect to other

policies. 927 F.2d 1473, 1480-81 (9th Cir.), *cert denied*, 112 S. Ct. 275 (1991). In Oklahoma, where the sheriff "was responsible for establishing the county's policy regarding the use of force," it was held that the county may be liable for the excessive force used by personnel within the sheriff's office. *Meade v. Grubbs*, 841 F.2d 1512, 1530 (10th Cir. 1988). The Fourth Circuit even rejected a county's argument that a sheriff is immune where the governor appoints the sheriff and where state courts have decided that sheriffs are state officers. *Dotson v. Chester*, 937 F.2d 920, 926, 927, 932 (4th Cir. 1991) (sheriff is liable under Section 1983 where violation occurred at county-financed jail operated by sheriff even when sheriff is immune for other purposes).

Other than the decision of the panel below, only one pertinent decision of a court of appeals declined to find a county liable for the acts of its sheriff. There the court also did not consider state law in any detail. *Soderbeck v. Burnett County*, 752 F.2d 285, 292 (7th Cir. 1985) (county sheriff held not a policymaker where "plaintiff made no effort to show that the sheriff is a policy-making official of the county government"). *See also Soderbeck v. Burnett County*, 821 F.2d 446, 452 (7th Cir. 1987), *cert. denied*, 471 U.S. 117 (1985) (refusing to consider such evidence newly offered by the plaintiff because of the "law of the case doctrine"). Thus, even in *Soderbeck*, the court accepted the county's liability defense reluctantly, and only because the plaintiff did not introduce any evidence of the sheriff's actual activities.[12/]

[12/] For the reasons stated in the text and at note 2 above, the Seventh Circuit's decision also may conflict with this Court's reasoning in *Elder v. Holloway*, 114 S. Ct. 1019.

III. ALABAMA CANNOT IMMUNIZE OFFICIALS OR COUNTIES FROM LIABILITY FOR INJURIES COMPENSABLE UNDER SECTION 1983.

Alabama courts apparently hold that county sheriffs are state officials for purposes of immunizing them from liability under state law. *See, e.g., Parker v. Amerson*, 519 So. 2d at 442. Indeed it appears that Alabama courts sometimes take an expansive notion of the scope of state immunity.[13/] Alabama courts, applying state immunity law to sheriffs, do so largely because sheriffs are technically designated as members of the "executive department" under the State Constitution. *Id.* at 443-44. *See also* Ala. Const. art. V, § 112.

Although it cited the *Amerson* decision, the court of appeals wisely declined to assume that immunity from state claims translates into immunity from Section 1983 claims. Pet. App. 33a. Indeed, the opinion below suggests that the court of appeals itself has some doubts about the scope of state law immunity claimed by the Alabama courts.[14/]

Section 1983 liability for a governmental official does not depend on the particular designation or label (such as "state official" or "county official") that the state attaches to that

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[13/] The Alabama Supreme Court once went so far as to immunize municipal police officials from liability because they hold "a public office of profit under the state." *Alexander v. State ex rel. Carver*, 150 So.2d 204, 208 (Ala. 1963).

[14/] The court of appeals panel held that "the fact that an Alabama sheriff 'works' for the state does not answer the question of whose policy he implements." Pet. App. 33a (*citing Parker v. Williams*, 862 F.2d 1471, 1478 (11th Cir. 1989)). By placing the term "works" in quotation marks, the court of appeals reveals its reluctance to accept the premise that sheriffs *actually* work for the state rather than for the counties.

official for its own purposes. The wide variety of state constitutional labels for county sheriffs is reason enough for not measuring Section 1983 liability by reference to such labels.[15/]

When analyzing whether an official is a policymaker for a local government, this Court examines how the official functions under state law and does not defer to the label that state governments may attach to the official. *See, e.g., Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. at 280; *Pembaur v. Cincinnati*, 475 U.S. 469, 483 n.12 (1986) (whether a county sheriff is final policymaker depends on local rules about the sheriff's function in county government); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (whether a school principal is final policymaker depends on a careful analysis of local regulations and policies); *St. Louis v. Praprotnik*, 485 U.S. 112, 124-127 (1988) (there is "a rich variety of ways in which the power of government is distributed," and a court must scrutinize local rules to determine how and by whom decisions are made).

This Court has consistently and appropriately rejected a mechanistic, label-oriented approach precisely because of the potential to undermine the broad remedial goals of Section 1983. Accordingly, this Court has emphasized that "[a]ny assessment of the applicability of a state law to federal civil rights litigation, therefore, must be made in light of the purpose and nature of the federal right." *Felder v. Casey*, 487 U.S. 131, 139 (1988). A

15/ Under the Alabama Constitution, elected county sheriffs are technically part of the state executive branch. Ala. Const. art. V, § 112. In Texas, Louisiana, and Maryland, elected county sheriffs are part of the state judicial branch. Tex. Const. art. V, § 23; La. Const. art. V, § 27 (for "parish" sheriffs); Md. Const. art. IV, § 44. In Indiana, elected county sheriffs are part of the "administrative" branch. Ind. Const. art. VI, § 2. And in other states, such as Kansas, elected county sheriffs are wholly the creation of the legislature, having no constitutional status whatsoever. Kan. Const. art. IX, § 2.

"state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted . . . because the application of the state immunity law would thwart the congressional remedy . . . ." *Id.*

This Court has held, unanimously, that "a State cannot immunize an official from liability for injuries compensable under federal law." *Howlett v. Rose*, 496 U.S. 356, 360 (1990) (citing *Martinez v. California*, 444 U.S. 277 (1980)). Any decisions by Alabama courts that might be used to limit the scope of Section 1983 liability should fail as a matter of federal law. *Howlett v. Rose*, 496 U.S. at 376-77. It has long been the rule that "'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Felder v. Casey*, 487 U.S. at 138 (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

Under Section 1983, the inquiry this Court has prescribed is one that looks to whether an official's "acts may fairly be said to represent official policy" for the county. *Monell v. Dep't of Social Servs.*, 436 U.S. at 694. Under this inquiry, state-law functions — rather than state-law labels — are decisive.

CONCLUSION

Alabama law provides that counties have law enforcement powers and it establishes county sheriffs as law enforcement policymakers for each county. The sheriffs are elected by the county and are paid by the county. Their offices are funded by the county treasury. They have jurisdiction only in their own counties and do not report to any official outside the county. In Alabama, county sheriffs are, as a matter of law, final law enforcement policymakers at the county level.

For the same reason that Alabama cannot immunize its

sheriffs from Section 1983 liability by broadly construing the state's sovereign immunity doctrine, Alabama cannot shield its counties from Section 1983 liability by technically designating county sheriffs as state officials when such a designation does not correspond to the way in which sheriffs actually exercise their law enforcement authority.

Respectfully submitted,

Steven R. Shapiro
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, NY 10036

Michael A. Cooper, Co-chair
Herbert J. Hansell, Co-chair
Norman Redlich, Trustee
Barbara R. Arnwine
Thomas J. Henderson
Sharon R. Vinick
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1450 G Street., N.W.
Suite 400
Washington, D.C. 20005

Mitchell F. Dolin
Robert A. Long, Jr.
T. Jeremy Gunn*
COVINGTON & BURLING
1201 Pennsylvania Ave. N.W.
Post Office Box 7566
Washington, D.C. 20044-7566
(202) 662-6000

Counsel for *Amici Curiae*

*Counsel of Record

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APPENDIX

ALABAMA CONSTITUTION

ARTICLE V.

Sec. 112. Composition, officers enumerated.

The executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner or agriculture and industries, and a sheriff for each county.

Sec. 138. Election and term of office of sheriffs; sheriff not eligible to succeed self; impeachment of sheriff; effect of impeachment of sheriff.

A sheriff shall be elected in each county by the qualified electors thereof, who shall hold office for a term of four years, unless sooner removed, and he shall be ineligible to such office as his own successor; provided, that the terms of all sheriffs expiring in the year nineteen hundred and four are hereby extended until the time of the expiration of the terms of the other executive officers of this state in the year nineteen hundred and seven, unless sooner removed. Whenever any prisoner is taken from jail, or from custody of any sheriff or his deputy, and put to death, or suffers grievous bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached under section 174 of this Constitution. If the sheriff be impeached, and thereupon convicted, he shall not be eligible to hold any office in this state during the time for which he had been elected or appointed to serve as sheriff.

ALABAMA CONSTITUTION

ARTICLE VII.

Sec. 173. Governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries and justices of supreme court.

The governor, lieutenant-governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and justices of the supreme court may be removed from office for willful neglect of duty, corruption in office, incompetency, or intemperance in the use of intoxicating liquors or narcotics to such an extent, in view of the dignity of the office and importance of its duties, as unfits the officer for the discharge of such duties, or for any offense involving moral turpitude while in office, or committed under color thereof, or connected therewith, by the senate sitting as a court of impeachment, under oath or affirmation, on articles or charges preferred by the house of representatives . . . .

Sec. 174. Chancellors, judges of circuit and probate courts, judges of courts from which appeal may be taken directly to supreme court, solicitors and sheriffs.

The chancellors, judges of the circuit courts, judges of the probate courts, and judges of other courts from which an appeal may be taken directly to the supreme court, and solicitors and sheriffs, may be removed from office for any of the causes specified in the preceding section or elsewhere in this Constitution, by the supreme court, under such regulations as may be prescribed by law. The legislature may provide for the impeachment or removal of other officers than those named in

this article.

ALABAMA CODE

§ 11-1-9. Payment of costs of defense of lawsuits against county officials; validation of prior payments.

(a) Any law to the contrary notwithstanding, the county commission of any county of the state of Alabama may, in its discretion, defray the costs of defending any lawsuit brought against any county official when such lawsuit is based upon and grows out of the performance by said official of any duty in connection with his office and does not involve a willful or wanton personal tort or a criminal offense committed by the official. The expenses of defending such litigation may include witness fees, transportation, toll and ferry expenses of witnesses, attorney's fees, court costs and any other cost in connection with the defense of said litigation.

(b) If any county has expended money for the purposes set out in subsection (a) of this section, such expenditure is hereby validated and shall not be charged back to the official making such payment nor shall the person who received such payment be liable for any reimbursement of same.

§ 11-3-4.1 Minimum compensation of county commissioners and county chairman; approval of county governing body; compliance with payment of judicial supplement.

(a) For the purposes of this section the following terms shall have the following meanings:

(1) COUNTY COMMISSION CHAIRMAN. Those persons elected or appointed to such office by any and all lawful means but shall not include those persons who serve as chairman

by virtue of their having been elected or appointed as probate judge of the county.

(2) COMPENSATION. All salary, expense allowance or any other compensation received for serving as commissioner or chairman of the county commission but shall not include any reimbursement for mileage traveled or actual and necessary expenses incurred which are otherwise payable by law.

(3) LOCAL LAW. Any and all applicable statutes that apply to any part of the state which is less than the whole and shall include statutes otherwise known as "general laws of local application" or "population bracket acts."

(b) No county commissioner shall receive compensation for serving as such officer, that is less than $14,600.00 per year. No county commission chairman shall receive compensation for serving as such officer, that is less than $18,600.00 per year.

(c) No county commissioner that is required by local law to serve full time as county commissioner, shall receive compensation for serving as such officer, that is less than $25,000.00 per year. No county commission chairman that is required by local law to serve full time as county commission chairman, shall receive compensation for serving as such officer, that is less than $30,000.00 per year . . . .

§ 32-2-1. Creation; headed by director; appointment and term of director.

There is hereby created a department of the state of Alabama which shall be known as the department of public safety and shall be headed by the director of public safety. The governor shall appoint the director, who shall serve at the pleasure of the governor.

§ 32-2-3. Divisions — Creation; enumeration.

The director shall create such divisions within the department of public safety as shall be necessary. Said divisions shall include:

(1) An administrative division;

(2) A highway patrol division;

(3) A driver's license division;

(4) A service division.

§ 32-2-4. Same — Chiefs; employees.

The director shall appoint chiefs of said divisions and all other employees subject to the provisions of the Merit System Act, and said chiefs and employees shall hold their positions subject to the provisions of the Merit System Act.

§ 32-2-6. Compensation and expenses of officers, employees, etc. — Method of payment generally.

The compensation of the officers, agents and employees provided for by this chapter shall be paid by warrants drawn by the comptroller on the funds appropriated by the legislature therefor as the salaries of state officials and employees are paid, and the necessary expenses and costs of necessary equipment are likewise to be paid by warrant drawn by the comptroller on the funds appropriated by the legislature therefor, and the amount to be expended hereunder shall be limited to the amount appropriated therefor by the legislature and shall be budgeted, allotted and expended pursuant to article 4 of chapter 4 of Title 41 of this Code.

§ 32-2-10. Insurance for employees.

The state department of public safety is authorized, subject to approval by the governor, to insure its employees in some insurance company or companies authorized to do business in the state of Alabama against personal injury or death caused by accident or violence while discharging their duties as such employees; provided, the amount of insurance to be procured as to any such employee shall not exceed the amount which would be payable to such employee under the workmen's compensation laws of the state of Alabama if such employee were privately employed; except, that such policy may provide additional benefits not to exceed $10,000.00 per employee for the payment of hospital and medical expenses.

The cost of such insurance shall be paid by the state department of public safety out of any funds appropriated to its use in manner provided by law.

§ 32-2-20. Establishment and maintenance.

The governor is authorized to establish and maintain a state highway patrol.

§ 32-2-22. Officers have powers of peace officers.

Members of the state highway patrol, when duly appointed, shall have the powers of peace officers in this state and may exercise such powers anywhere within the state.

§ 36-21-1. Payment of fees and costs of defense of state law enforcement officers in certain cases.

Any law enforcement officer of the state of Alabama who is sued or prosecuted for any act committed or done within the line and scope of his duties and authority will be reimbursed by the

state for legal counsel fees paid, the fees of witnesses paid by him and costs of court he paid out in defending the civil action or prosecution; provided, that the total amount of such reimbursable expenses shall not exceed $2,000.00 and provided the committee established by this section approves such claim. The committee shall consist of two members of the house of representatives named by the speaker, two members of the senate named by the president of the senate and the attorney general of Alabama. The members of the committee shall serve during their tenure in their respective offices without compensation. The acts of any three members shall constitute action by the committee. The committee shall elect a chairman from among its number and shall meet on the call of the chairman.

As used in this section the term "law enforcement officer" means any person employed in the classified civil service of the state whose duties involve police work.

§ 36-22-3. Duties [of sheriffs] generally.

It shall be the duty of the sheriff:

(1) To execute and return the process and orders of the courts of record of this state and of officers of competent authority with due diligence when delivered to him for that purpose, according to law.

(2) To attend upon the circuit courts and district courts held in his county when in session and the courts of probate, when required by the judge of probate, and to obey the lawful orders and directions of such courts.

(3) The sheriff of each county must, three days before each session of the circuit court in his county, render to the county treasury or custodian of county funds a statement in writing and on oath of the moneys received by him for the county, specifying

the amount received in each case, from whom and pay the amount to the county treasurer or custodian of county funds.

(4) It shall be the duty of sheriffs in their respective counties, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes in their counties and to present a report of the evidence so secured to the district attorney or assistant district attorney for the county.

(5) To perform such other duties as are or may be imposed by law.

§ 36-22-16. Compensation.

(a) Sheriffs of the several counties in this state shall be compensated for their services by an annual salary payable in equal installments out of the county treasury as the salaries of other county employees are paid. The annual salary of the sheriff shall be $35,000.00, commencing with the next term of office, unless a higher salary is specifically provided for by law by the general or local act hereafter enacted.

(b) Such salary shall be in lieu of all fees, compensation, allowance, percentages, charges and costs, except as otherwise provided by law. The sheriff and his deputies shall, however, be entitled to collect and retain such mileage and expense allowance as may be payable according to law for returning or transferring prisoners and insane persons to or from points outside the county.

§ 36-22-18. County commission to furnish necessary quarters, equipment, etc.

The county commission shall also furnish the sheriff with the necessary quarters, books, stationery, office equipment, supplies, postage and other conveniences and equipment, including

automobiles and necessary repairs, maintenance and all expenses incidental thereto, as are reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office.

(1)

No. 93-1636

IN THE

Supreme Court of the United States

October Term, 1994

TOM SWINT, *Et Al.*,

Petitioners,

V.

CHAMBERS COUNTY COMMISSION, *Et Al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION AS AMICUS CURIAE

J. Michael McGuinness*
McGuinness & Parlagreco
P.O. Box 8035
Salem, MA 01971
(508) 741-8051

*Counsel of Record

Appellate Printing Services • 523 East Main Street • Richmond, VA 23219 • (800) 642-7789

17 pp

QUESTIONS PRESENTED

Whether a county sheriff is a final policymaker for his/her county in law enforcement matters for purposes of county constitutional tort liability under 42 U.S.C. 1983 where the sheriff is the ultimate authority for county law enforcement policy?

A) Whether the acts and edicts of a county sheriff performing traditional law enforcement functions represent official county policy where the county sheriff's department is the exclusive provider of law enforcement services within the county?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

No. 93-1636

TOM SWINT, *Et. Al.*,

Petitioners

v.

CHAMBERS COUNTY COMMISSION, *Et. Al.*,

Respondent

On Writ of Certiorari To The
United States Court of Appeals
For The Eleventh Circuit

BRIEF OF THE SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The Southern States Police Benevolent Association (hereafter SSPBA) is a non-profit association comprised of over twenty thousand law enforcement officers and related public employees in ten southern states. SSPBA and its various state affiliates engage in various types of advocacy, lobbying, litigation and scientific analyses of various law enforcement issues. SSPBA promotes improved law enforcement and constitutional protections for everyone.

SSPBA and its members are vitally interested in the grave constitutional issues before this Court. Law enforcement officers are frequently victims of constitutional torts, often in the employment context. SSPBA has litigated a number of cases involving similar issues of county liability for the constitutional torts of a sheriff. SSPBA accordingly submits this brief to assist this Court in its resolution of this important case.[1]

STATEMENT OF THE CASE

Amici adopt the Statement of the Case and Facts as presented by Petitioner.

SUMMARY OF ARGUMENT

Sheriffs are typically the final repository of law enforcement policy for counties throughout America. The acts and edicts of a county sheriff performing traditional law enforcement functions in a county where the sheriff's department is the exclusive provider of law enforcement services represent the official policy of that county.

The overwhelming weight of substantially settled circuit court authority holds that counties may be liable for constitutional torts of its sheriff whenever the sheriff is performing a traditional law enforcement function. Accordingly, this Court should reverse the Eleventh Circuit below, and alternatively adopt the approach taken in other

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[1] The parties have consented to the filing of this brief amicus curiae. Letters indicating their consent have been filed with the Clerk of Court.

cases addressed *infra*. The decision below is an aberration and is inconsistent with this Court's decisions in *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), *Pembaur v. City of Cinncinnati*, 475 U.S. 469 (1986) and *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). The decision of the Eleventh Circuit below represents a severe restriction upon the rights of victims to challenge often brutal law enforcement tactics necessitating constitutional tort liability against counties.

I. INTRODUCTION ROLE OF SHERIFFS AND COUNTIES

When a sheriff or his deputy commits an actionable constitutional tort while acting in their official capacity, the determinative question of who is responsible and ultimately liable arises. Since sheriffs are governmental actors, they act under color of authority vested in them by their state and local law. Sheriffs are typically held to be **county**, rather than state officials. See, e.g., *Hull v. Oldham*, 104 N.C. App. 29, 407 S.E.2d 611, 618 (1991)(under North Carolina law, sheriffs are county officials, rather than state officials). Thus, the conduct of sheriffs are actionable under 42 U.S.C. 1983 without an Eleventh Amendment bar.

Since sheriffs and their deputies are frequently shielded from personal and individual liability by the doctrine of qualified immunity, and because many sheriffs and their deputies are effectively judgment proof in their individual capacities, the only real and effective remedy for a constitutional tort by the sheriff is a remedy from the County. Since a judgment against a public official in

an official capacity suit is tantamount to a judgment against the governmental entity, *Brandon v. Holt*, 469 U.S. 464 (1985), the decision of the court below would leave victims of police misconduct without an effective remedy.

Consequently, under Respondent's strained view of section 1983 jurisprudence, no entity of government would be financially responsible for the acts of the County sheriff in his official capacity in the performance of law enforcement functions. Such a result is untenable and is inconsistent with this Court's history of affording remedies where important federal rights are contravened.

In most jurisdictions, state law frames the parameters of responsibility for various government functions and overlapping responsibilities among sheriffs and counties.[2] Counties frequently enact local ordinances to further delineate the responsibilities between the sheriff and the county. This structure typically creates layers of state and local law, enacted to serve local conditions and customs, that form the framework of rights and responsibilities of sheriffs and county governments. Frequently, sheriffs are alter egos of the county. Unfortunately, state and local legislation often

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[2] For example, see the North Carolina system, which is set out in a state constitutional and statutory scheme, which appears in scattered sections of the General Statutes. See N.C.G.S. 153A-101 (Board of County Commissioners directs fiscal policy for county), 153A-1-3 (regulating employment practices of sheriffs and counties over deputy sheriffs); chapter 162 which provides numerous sections regulating the sheriff in various areas; N.C.G.S. 162-22 (providing that the sheriff must "have the care and custody of the jail in his county."

do not adequately delineate responsibilities sufficiently clear so that one can readily allocate liability.[3] Often, there are shared obligations which results in shared responsibility and liability. Even where the county is not a direct participant in the conduct giving rise to the complaint, under this Court's teachings in *Pembaur* and other cases, the county is responsible for the conduct of its final policymakers, whoever they may be.

In most American jurisdictions, traditional sheriffs and their sheriff's departments provide law enforcement within their own counties. Unless there is some other county organized police, sheriffs traditionally provide the exclusive law enforcement function for the entire county. When county sheriffs provide the **exclusive** countywide law enforcement services, such sheriffs undoubtedly constitute the final county policymaker for law enforcement matters.

Sheriffs' Departments are supported by their sponsoring counties in numerous and varied ways. Counties typically have statutory responsibilities to provide law enforcement, both directly and indirectly. Counties typically provide law enforcement through their own sheriff, although, metropolitan and other areas also sometimes

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[3] Consequently, there has been substantial litigation of these issues, much of which has to be on a case by case basis in order to properly apply both state and local law to determine who is the final policymaker in a given area. See e.g., *Reid v. Johnston County*, 688 F. Supp. 200, 202 (E.D.N.C. 1988), aff'd, 878 F.2d 430 (4th Cir. 1989)(explaining how the North Carolina statute makes clear that the responsibility for county confinement rests with the county.)

employ police agencies.[4] Counties typically provide the backbone of their sheriff's departments - financially, by hiring personnel, by performing various other personnel functions, by purchasing police equipment, by affording training, by providing law enforcement facilities, among other things. Counties typically have the responsibility of providing a local jail, which are traditionally managed by the sheriff. See *Dotson v. Chester; Heflin v. Stewart County*, 958 F.2d 709, 716-17 (6th Cir. 1992)(section 1983 claim against county for inmate's medical needs valid because sheriff was the sole policymaker for the conduct of jail officials).

Consequently, in every material respect, sheriffs are the final policymaking authority for law enforcement purposes within the County especially where the sheriff's department is the exclusive provider of law enforcement services. See, e.g., *Dotson v. Chester*, 937 F.2d 920 (4th Cir. 1991); *Buzek v. County of Saunders*, 972 F.2d 992 (8th Cir. 1992); *Turner v. Upton County*, 915 F.2d 133, 136-37 (5th Cir. 1990) and cases cited therein; *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989); *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985); *Weber v. Dell*, 804 F.2d 796 (2nd Cir. 1986); *Marchses v. Lucas*, 758 F.2d 181 (6th Cir. 1985). These and other compelling circuit court authorities afford substantial history and solid precedent for Petitioner's position. These cases are consistent with this Court's teachings in *Monnel, Pembaur, Praprotnik* and their progeny, which should not be disturbed. The overwhelming weight of circuit court authority is consistent with *Dotson*, therefore generally making counties liable for the constitutional torts of their sheriffs. The Eleventh Circuit decision below is an aberration and a retreat from this Court's precedents. The *Monnel* doctrine has worked well in governing section 1983 claims against counties and sheriffs. Respondents, nor the Eleventh Circuit below, have offered any justification for such a retreat from this Court's traditional constitutional protection.

[4] Where there is an additional countywide law enforcement agency that has jurisdiction, the sheriff may not necessarily still be the final policymaking authority. One would have to examine the delegation of authority to the other countywide law enforcement agency, and contrast that with the authority afforded the sheriff, in order to ascertain section 1983 liability.

II. DECISIONS OF FINAL POLICYMAKING OFFICIALS IN LAW ENFORCEMENT ARE IMPUTABLE TO THE GOVERNMENTAL ENTITY

Governmental liability arises from a deprivation of federal rights caused by any official with final policymaking authority. *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). This Court has made clear that the question of "whether a particular official has 'final policymaking authority' is a question of state law." *Praprotnik*, 485 U.S. at 124. In assessing this question, Justice O'Connor explained how "state law (which may include valid local ordinances and regulations) will always direct a court to some official or body that has the responsibility for making law or setting policy in any given

area of a local government's business." *Id.* at 124.[5] In law enforcement at the local level, it is the county sheriff.

III. *DOTSON V. CHESTER* COMPELS THE COUNTY'S LIABILITY FOR CONSTITUTIONAL TORTS OF SHERIFFS PERFORMING TRADITIONAL LAW ENFORCEMENT FUNCTIONS

In *Dotson*, the Fourth Circuit held that the actions of a Sheriff constituted the final policymaking authority of the County, therefore subjecting the County to liability for the Sheriff's conduct. The court also held that the Sheriff wielded county, as opposed to state, authority. *Dotson* involved an examination of state law and the particular symbiotic relationship between the sheriff and county. Accord *Revene v. Charles County Commissioners,* 882 F.2d 870, 874 (4th Cir. 1989)(Sheriff's Department is an agency of County government).[6] See *Logan*

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[5] As explained by the Fourth Circuit in *Dotson v. Chester*, 937 F.2d at 924, "state and local laws" must be "searched" ... to determine "whether the actions of a county sheriff represent final policymaking authority for the county, thereby creating county liability." *Dotson* explained that "our exploration passes through case law, the county code, state statutes, and state regulations." 937 F.2d at 295.

[6] *Dotson* recounted analysis from a number of leading cases dealing with the issue of holding counties liable for the conduct of Sheriffs. See cases cited at 937 F.2d at 925 - 932, especially *Turner v. Union County,* 915 F.2d 133 (5th Cir. 1990)("County liability under section 1983 must attach ... when the official representing the ultimate repository of power in county makes a deliberate decision..." ; *Zook v. Brown*, 865 F.2d 887, 895 (7th Cir. 1989)(sheriff responsible for employee discipline therefore County liable for Sheriff's conduct).

v. Shealy, 660 F.2d 1007 (4th Cir. 1981)(sheriff's conduct chargeable to county). The same analysis should be applied to the case *sub judice*.

The Fourth Circuit's conclusion in *Dotson* heavily relied upon *Parker v. Williams,* 862 F.2d 1471 (11th Cir. 1989), which held the county liable for the sheriff's employment decisions because the sheriff possessed the "ultimate county authority" with respect to personnel decisions. *Parker* reasoned that "[t]he county need not exercise direct control over the sheriff with respect to the sheriff's hiring decisions in order to be liable under section 1983 for damages caused by those decisions." *Id.* at 1479-80.

IV. SHERIFFS ARE FINAL COUNTY POLICYMAKERS FOR EMPLOYMENT FUNCTIONS WITHIN COUNTY SHERIFF'S DEPARTMENTS

In addition to holding counties liable for the constitutional torts of sheriffs in law enforcement functions, county liability is applicable in other contexts. A plethora of authorities have **uniformly** held that Sheriffs are generally held to be county policymakers for purposes of employment terminations of deputy sheriffs.[7] The scenario

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[7] E.g., *Bouman v. Block,* 940 F.2d 1211, 1231 (9th Cir. 1991)(delegation by County to Sheriff of final policymaking authority for employment matters renders County liable); *Davis v. Mason County,* 927 F.2d 1473 (9th Cir. 1991)(sheriff had final authority for training of deputies); *Marchese v. Lucas,* 758 F.2d 181 (6th Cir. 1985)(sheriff is law enforcement arm of county and therefore makes final policy for county); *Crowder v. Sinyard*

continued on next page

in *Lucas v. O'Loughlin*, 831 F.2d 232 (11th Cir. 1987) presents an appropriate analytical framework for addressing these troubling section 1983 issues. There, the court reasoned that:

> Although elected by virtue of state law, he [the sheriff] was elected to serve the County as Sheriff. In that capacity, he has absolute authority over the appointment and control of his deputies. His and their salaries were paid by local taxation and according to a budget approved by the county commissioners." *Id.* at 235.

Lucas consequently held that the sheriff was the final policymaker with respect to employment of deputies, therefore rendering the County liable for the Sheriff's conduct.[8] In *Buzek v. County of Saunders*, 972 F.2d 992 (8th

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[7] *continued*
854 F.2d 804, 828-29 (5th Cir. 1989)(sheriff as county policymaker); *Weber v. Dell*, 804 F.2d 796 (2nd Cir. 1986)(sheriff as final policymaker for county); *Anderson v. Gutschenritter*, 836 F.2d 346 (7th Cir. 1988). Police agencies typically have delegated employment decisionmaking authority to the Sheriff or police department, therefore making the governmental entity liable for the decisions of the sheriff or chief. E.g., *Larez v. Los Angeles*, 946 F.2d 630 (9th Cir. 1991)

[8] Accord *Williams v. Butler*, 863 F.2d 1398 (8th Cir. 1988)(governmental liability affirmed where there had been an "absolute delegation of authority" for employment matters).

Cir. 1992), the court similarly grappled with the issue of whether a county could be liable for the actions of a sheriff in discharging a deputy for free speech. There, the trial court had rendered a verdict for $127,000 on behalf of the plaintiff deputy against the Sheriff and the County. The deputy had communicated by letter to a judge supporting a criminal defendant on a sentencing matter. The letter angered the Sheriff, who dismissed the deputy. The court held that:

> [Sheriff] Poskochil's broad discretion to set policy as the County's elected Sheriff, and the County Attorney's testimony that [Sheriff] Poskochil had exclusive authority to fire [Deputy] Buzek, adequately support the jury's determination that [Sheriff] Poskochil possessed the discretionary, policymaking authority necessary to hold the county liable for this decision. 972 F.2d at 996.

The decisionmaking structure between the Sheriff and the County in *Buzek* is similar to that in the case *sub judice*. Accord *Click v. Copeland and Bexar County Texas*, 970 F.2d 106 (5th Cir. 1992)(reversing directed verdict for county and sheriff on qualified immunity grounds; remand to determine if sheriff played role as county policymaker).

CONCLUSION

WHEREFORE, for the reasons stated herein and in Petitioner's brief, this Court should reverse the decision below.

J. Michael McGuinness*
McGuinness & Parlagreco
P.O. Box 8035
11 Church Street, Suite 306
Salem, MA 01971
508-741-8051
Counsel of Record
For Amicus Curiae SSPBA

No. 93-1636

In The

Supreme Court of the United States

October Term, 1994

TOM SWINT, TONY SPRADLEY,
DRUCILLA JAMES and JEROME LEWIS,

Petitioners,

v.

CHAMBERS COUNTY COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF AMICUS CURIAE OF JEFFERSON COUNTY, ALABAMA SUPPORTING RESPONDENT

*CHARLES S. WAGNER
Assistant County Attorney
Office of Jefferson County Attorney
Jefferson County Courthouse, Rm 214
716 21st Street North
Birmingham, Alabama 36253
(205) 325-5688
Counsel for Amicus Curiae

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

45 pp

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

RULES:

TABLE OF AUTHORITIES – Continued

No. 93-1636

In The

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v.

CHAMBERS COUNTY COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF AMICUS CURIAE OF JEFFERSON COUNTY, ALABAMA SUPPORTING RESPONDENT

Jefferson County, Alabama (hereafter "Jefferson County") respectfully submits its brief *amicus curiae* in support of the respondent. Pursuant to Rule 37, all parties before this Court have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

Jefferson County, in terms of population, is the largest county in Alabama. Jefferson County Sheriff Mel Bailey employs 570 deputies, the largest number in the

State of Alabama. The Jefferson County Commission exercises no statutory control over the law enforcement activities of the Sheriff nor does the Jefferson County Commission exercise any actual control of any kind over the Sheriff's law enforcement activities. The County Commission is merely the source of funding for the Sheriff's operations. Under the Jefferson County personnel merit system established by Alabama Act 248, Regular Session, 1945, the Sheriff is an independent appointing authority with complete control over the hiring and firing of deputies and support personnel. *Wilson v. Bailey*, 934 F.2d 301 (11th Cir. 1991). The Sheriff makes all decisions regarding assignment of duties and responsibilities pertaining to the operation of his department.

On several occasions, the Eleventh Circuit Court of Appeals has affirmed summary judgment, or otherwise ruled in favor of Jefferson County, based upon the County's lack of control over the Sheriff and his deputies. *See e.g. Tittle v. Jefferson County Comm'n*, 10 F.3d 1535 (11th Cir. 1994) (*en banc*); *Dean v. Barber*, 951 F.2d 1210 (11th Cir. 1992); *Wilson*, 934 F.2d at 301. Implicit in these rulings is a recognition that Jefferson County should not be held liable for the acts or omissions of the Sheriff because it does not control the Sheriff's exercise of discretion in the performance of his law enforcement duties and responsibilities. Indeed, in *Dean*, the Eleventh Circuit held that the Sheriff and his deputies are employees of the State of Alabama. The Court affirmed the principle that the County Commission could not be held liable for the acts or omissions of the Sheriff and his deputies on a respondeat superior liability basis.

If this Court elects to reverse the judgment of the Eleventh Circuit Court of Appeals in the instant case, and impose liability upon Alabama counties, including Jefferson County, the impact of such a ruling would not only be contrary to this Court's precedent but could devastate Alabama counties' limited fiscal resources.

STATEMENT OF THE CASE

Amicus Jefferson County incorporates and adopts by reference the "Statement of the Case" included in the Respondent's Brief.

SUMMARY OF ARGUMENT

The Eleventh Circuit Court of Appeals properly determined that, under Alabama law, sheriffs are state rather than county policymakers with respect to law enforcement. The analysis used by the Eleventh Circuit to reach this conclusion was inherently sound: how can a sheriff be said to represent county policy when he is a state officer, acting to enforce state law (Alabama's criminal code), and is in no way answerable to the county's governing body for policy decisions or conduct of his department? Neither the Petitioners nor their *amici* are able to penetrate this logic. Instead, they merely point out the fact that Alabama counties fund the sheriff's office, often at levels mandated by state law, and that county voters elect the sheriff (as if to say the voters should have

foreseen that they were electing a tortfeasor) and conclude "If this analysis was good enough for the Sixth Circuit, it should not be questioned."

Of course, the reasoning of the Eleventh Circuit in the opinion below is in direct conflict with the approach taken by the Sixth Circuit in *Pembaur v. City of Cincinnati*, 746 F.2d 337, 341 (6th Cir. 1984) and, presumably, that is why a writ of certiorari was granted. Because Alabama law has clearly, at least since the Constitution of 1901, established sheriffs to be executives of the state, an "arm of the governor . . . to see that the laws are faithfully executed,"[1] who are, pursuant to state statutes, supervised by state judges, there is no basis for finding them to be anything other than state policymakers in the area of law enforcement.

What the Petitioners and their *amici* fail to appreciate is, due to the lack of "home rule", the inherent weakness of Alabama county governments, especially in relation to law enforcement. There is no county law enforcement policy because counties have no law enforcement powers. The theory propounded by the Petitioners – hold the county liable for all officers who are elected from within the county's boundaries and are funded by the county regardless of function or control – is contrary to logic and would bring a host of state officers under the burgeoning umbrella of county liability. Petitioners' theory, if extended to its logical conclusion, would also, apart from state law, create new entities capable of incurring liability

[1] *Official Proceedings of the Constitutional Convention of the State of Alabama*, May 21 to September 3, 1901, Vol. I, 882-83.

under 42 U.S.C. § 1983: regions made up of two or more counties which "jointly" elect and fund state officers.

The Respondent's "right of control" paradigm presents a far more logical and practical way of distinguishing between state and county policymakers for purposes of constitutional tort liability: the governmental entity which is able to extend, limit, abolish, or otherwise control the power of a certain officer should be liable for the consequences of that officer's conduct or policies. For instance, Alabama counties *should* be liable if their commission or county road engineer (appointed by the commission) approves a racially discriminatory policy with respect to the hiring of county road workers. However, the county should not be liable when it could do *nothing* to prevent or correct misconduct of a particular state officer, like the sheriff. The Court of Appeals for the Eleventh Circuit should be affirmed.

ARGUMENT

I. ALABAMA LAW UNEQUIVOCALLY ESTABLISHES LOCAL SHERIFFS TO BE STATE OFFICIALS UNDER STATE CONTROL WHEN THEY PERFORM LAW ENFORCEMENT FUNCTIONS.

All parties agree that the question of whether local officials are final policymakers for a particular governmental entity is to be determined by looking to state law. *See* Petitioners' Brief at 10; Respondent's Brief in Opp'n to Pet. for a Writ of Cert. at 5 (*quoting Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion)). *See also City of St. Louis v. Praprotnik*, 485 U.S. 112, 126

(1988); *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737-38 (1989) (plurality opinion). Consequently, the question before the Court is whether the court of appeals below properly interpreted Alabama law on the matter of whether sheriffs are exercising final county policymaking authority when they enforce the state's criminal law. If any state's laws have "sp[oken] with perfect clarity" to this question, it is Alabama's. *See Praprotnik*, 485 U.S. at 125-126 ("We are not, of course, predicting that state law will always speak with perfect clarity [on this issue].").

A. Alabama's Constitution of 1901, besides designating sheriffs as members of the state's executive department, centralized control over sheriffs with the state.

Alabama's current constitution, the Constitution of 1901, describes sheriffs as members of the executive department of the State of Alabama. Ala. Const. of 1901 art. V, § 112. Delegates at the Constitutional Convention of 1901 expressed their concerns about the then-current state of the law (prior to 1901), which held sheriffs accountable *only* to local constituencies.

> Sheriffs are elected by the people of a county. They are not elected by the people of the state at large, and they are only state officers in the sense that they are part of the executive. They are not responsible to the chief executive of the state, but they are responsible to the people who elected them. Under the law as it now is [prior to the Constitution of 1901] . . . [if] they fail to perform the duty imposed upon them by law, . . . the enforcement of that law and their removal from office is placed in the hands of the courts of the *county* in which they serve.

Official Proceedings of the Constitutional Convention of the State of Alabama, May 21 to September 3, 1901, Vol. I, 878 (1940) (emphasis added) (hereafter "*Official Proceedings*"). This lack of centralized state control had, at least to the thinking of the 1901 constitutional convention attendees, allowed sheriffs to ignore, without accountability, various acts of mob violence and vigilantism including lynchings. *See Parker v. Amerson*, 519 So. 2d 442, 443 (Ala. 1987); *Official Proceedings*, at 879 ("So long as the Sheriff can with impunity turn over his prisoner to a mob and let them take him and do as they will with him and *only be answerable to the people of his county* where the crime is committed, . . . lynch-law will prevail in the State of Alabama.")

In an effort to combat this disturbing trend of violence, former Alabama Governor Thomas G. Jones proposed significant changes in the way sheriffs could be removed from office for neglect of duty. The practical effects of these enactments were that, "sheriffs were made more accountable to the supreme executive officer of the state, the Governor, . . . and the [Alabama] Supreme Court [obtained] original jurisdiction to hear impeachment proceedings against sheriffs." *Parker*, 519 So. 2d at 444. *See* Ala. Const. of 1901 art. V, § 138, App. at 2; Ala. Const. of 1901 art. VII, § 174, App. at 4; Ala. Const. of 1901 amend. No. 35, App. at 5. The grounds for impeachment of the sheriff were also expanded to include his failure to prevent harm being done to those within his custody. *See* Ala. Const. of 1901 art. V, § 138 ("Whenever any prisoner is taken from jail, or from the custody of any

sheriff or his deputy, and put to death, or suffers grievance bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached under § 174 of this Constitution.")

The convention delegates viewed the power to originate impeachment actions against sheriffs to be a vital weapon in the governor's arsenal, without which he could not insure the faithful execution of state law.

> We have already passed upon the question as to whether the governor of Alabama shall be charged in this Constitution with seeing that the laws of this State are faithfully executed, and we have already by an article which has been passed upon by this Convention declared that it shall be the duty of the governor to see that the laws of the State are executed. The governor is an executive officer. *Each sheriff is an arm of the governor and it is only through the sheriff that the governor can see that the laws are faithfully executed in each county although the sheriff represents the executive in the county where he is elected and where he perform[s] his duties.* As we have charged the governor in the Constitution with seeing that the laws are faithfully executed, it would seem that it would be proper also in the very same Constitution to have a provision whereby he may have some authority to act, and whereby he can require the executive officer in each county to perform his duty and to faithfully execute the law.

Official Proceedings, at 882-83.

The 1901 Constitution also vested the governor with the power to "require information in writing, under oath, from the officers of the executive department [which

includes sheriffs] . . . relating to the duties of their respective offices. . . . " Ala. Const. art. V, § 121 (1901), App. at 1. The giving of a false report by a member of the executive department to the governor was elevated into an impeachable offense by the 1901 Constitution. *See* Ala. Const. art. VII, §§ 173, 174, 175 (1901), App. at 3-5. *Cf.* Ala. Const. art. V, § 9 (1875) (False report to governor was the equivalent of perjury which could only be heard in local courts.).

B. Alabama's statutory framework further strengthens the sheriffs' ties with the state.

State law places sheriffs under the supervision of state circuit judges. Alabama Code § 12-17-24 mandates that "[t]he presiding circuit judge shall exercise a general supervision of the judges, clerks, registers, court reporters, bailiffs, *sheriffs* and other court employees of the circuit and district courts within the circuit, except employees for the clerk, and see that they attend strictly to the prompt, diligent discharge of their duties." Ala. Code § 12-17-24 (1975) (emphasis added). This supervision is not one in which "a presiding judge can direct and usurp the functions and duties of the named officials." *Resolute Insurance Co. v. Ervin*, 234 So. 2d 867, 870 (Ala. 1970). Rather, the judge's supervisory power extends only to ensure "that officials promptly and diligently discharge their duties." *Id.*

Additionally, pursuant to statutory enactments, the minimum training requirements of sheriff's department employees are established by the *state* rather than the

county[2] and are supervised by a state agency. *See* Ala. Code § 36-21-46 (1975).[3] Likewise, though compensation for sheriffs and their deputies is taken out of the county treasury, *state law* establishes their rate of compensation. Ala. Code §§ 36-21-16, 36-21-10 (1975).

Finally, state law gives Alabama governors the power to fill all vacancies in the office of sheriff. *See* Ala. Code § 36-9-17 (1975); *McRae v. State*, 112 So. 2d 487 (Ala. 1959). Out of sixty-seven sheriffs, vacancies are a common occurrence. Presumably under the Petitioners' theory emphasizing electoral base, the elected sheriffs would be county policymakers while appointed sheriffs would be state policymakers, with no difference in function or authority.

C. County governments in Alabama are, by design, very limited in function and exercise no law enforcement authority.

Alabama counties are powerless to control the sheriffs, their deputies, or their law enforcement policies. In fact, as this Court recently stated, the primary function of the counties' governing body, the county commission, is

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[2] In contrast, Alabama county commissions have no "authority to hire, fire, train . . . [or] assign deputy sheriffs." *Sanders v. Miller*, 837 F. Supp. 7106, 7110 (N.D. Ala. 1992); *see Carr v. City of Florence*, 916 F.2d 1521, 1525-26 (11th Cir. 1990); *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989).

[3] *Cf. Davis v. Mason County*, 927 F.2d 1473, 1481 (9th Cir. 1991). As one ground for holding the county liable for acts of sheriff's deputies, the Ninth Circuit found that the state merit law did *not* cover the training of sheriff's deputies.

to oversee county road construction and repair. *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992) (Kennedy, J.) (holding that routine decisions of Alabama county commissions with respect to road management do not implicate the Voting Rights Act of 1965). Alabama counties, through their commissions or otherwise, are severely constricted in their influence and are "authorized to do only those things permitted or directed by the legislature of Alabama." *Lockridge v. Etowah County Comm'n*, 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984).

In *Lockridge*, Alabama's intermediate level appellate court rebuffed one county's attempt to bring personnel of the sheriff's department under county control. The court found that no authority existed for the commission "to promulgate work rules for the employees of the sheriff's office, especially the sheriff's deputies. In the absence of such authority, [the court was] constrained to hold that the Etowah County Commission has no power to grant leaves of absence to the sheriff's deputies. The sheriff is the only official who has such authority." 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984).

Although *Lockridge* did not involve the type of law enforcement policies involved in the instant case (i.e., alleged unconstitutional searches and seizures), the holding certainly illustrates the relative powerlessness of Alabama counties with respect to the sheriff. Alabama counties have no inherent "police powers," are unable to enact criminal codes, and must rely exclusively upon the state and its agents for law enforcement.

The only link between the county commission and the sheriff that the Petitioners are able to point out is

fiscal. According to state law, the sheriff's salary comes out of county funds and the county is obligated to provide the sheriff's department with quarters, office supplies, equipment, and automobiles. Ala. Code §§ 36-22-16, 36-22-18 (1975 & Supp. 1991). However, the mere fact that counties provide a portion of the sheriff's department's fiscal needs, as mandated by *state law*, is not the equivalent of county control over law enforcement. First, the county does not have "unfettered discretion" over the granting or denial of the sheriff's reasonable budgetary requests. *See Etowah County Comm'n v. Hayes*, 569 So. 2d 397, 399 (Ala. 1990); *Morgan County Comm'n v. Powell*, 293 So. 2d 830 (Ala. 1974). In other words, a county commission could not legally give the sheriff the ultimatum: either reform your policies or we will refuse to fund the hiring of new deputies or the purchase of new squad cars. Additionally, sheriffs are partially funded from sources wholly outside of county authority, such as proceeds from drug-related offense forfeitures and fees from pistol permits.

D. The extent of state control over county sheriffs is well-illustrated in Jefferson County.

Jefferson County, like the other sixty-six counties in Alabama, has little, if any, day-to-day control over the sheriff and his deputies, nor does it have the ability to set salaries, make provisions for retirement benefits or hire chief deputies and assistants without approval by the state legislature. Virtually every aspect of the sheriff's office is controlled and regulated by the state, not the county. For example, the release of certain prisoners, 1951

Ala. Acts 94, and the disposal of contraband by purchasing agents, 1969 Ala. Acts 522, which are very specific to Jefferson County's sheriff's department, are mandated or regulated pursuant to enactment by the state. These acts exemplify the county's lack of control over the most minuscule decisions affecting the sheriff's department.

Even where the county commission has some discretion over assignment of offices in the Courthouse or quarters for elected officials, the Alabama Supreme Court has made a special exception for the Sheriff. *See Orange v. Bailey*, 548 So. 2d 424 (Ala. 1989) (holding county did not have discretion to assign Sheriff to quarters other than those located in the courthouse). If the County cannot even tell the Sheriff where his offices will be, how can it be said to control his law enforcement activities.

The county commission also has no control over the salaries, fees or allowances to sheriffs, deputies or their assistants; rather, the state legislature provides for such. Compensation and appointment of the Assistant Sheriff of the Bessemer Division of the Jefferson County Sheriff's Department, compensation for the Executive Assistant to the Sheriff of Jefferson County, and the Chief Deputy of Jefferson County, are all mandated by the state, with no county participation. 1988 Ala. Acts 88-937 (1st Special Sess.); 1987 Ala. Acts 87-790; 1988 Ala. Acts 88-851 (1st Special Sess.). Fees for the service of summons, and deputies witness fees, as well as the regulation of fees, and the determination of pistol permit fees, which provide a large amount of money to the Sheriff outside of that amount allotted to him by the county, are all legislated by the state, not the county. 1973 Ala. Acts 331; 1964 Ala. Acts 102; 1965 Ala. Acts 513; 1975 Ala. Acts 369. The state also

determines the sheriff's expense allowance, and the deputies subsistence allowance. 1989 Ala. Acts 89-791; 1988 Ala. Acts 88-897 (1st Special Sess.).

E. The state law authority cited by the Petitioners does not establish that sheriffs are county policymakers.

The Petitioners' cite to several cases in support of their argument that "Alabama law and the Alabama courts frequently have expressed the common understanding of the sheriff as a county-based official setting policy for the county." Petitioners' Brief at 14. However, none of the cited cases address the question of law enforcement policymaking authority; rather, they are directed to extremely narrow contexts.

First, *Jefferson County v. Dockerty*, 30 So. 2d 474 (Ala. 1947), while describing the sheriff of Jefferson County to be a county officer, merely did so for the purpose of identifying officers who were to pay fees, cost and commissions into the county treasury pursuant to Ala. Code, Title 62, § 139 (1940). *Dockerty*, 30 So. 2d at 477 ("the sheriff of Jefferson County is undoubtedly a county officer *within the meaning of section 139*") (emphasis added).

Similarly, in *In re Opinions of Justices*, 143 So. 345 (Ala. 1932), the Alabama Supreme Court, in the context of discussing the regulation of fees, salaries and allowances paid by the county under the Second Amendment to the Constitution of 1901, held that "the officeholders there mentioned," which included the sheriff, "are county officers *within the meaning of Amendment 2 to the Constitution of 1901.*" *Id.* (emphasis added). Nowhere does the court

discuss the issue of "county-based official[s] setting policy for the county." Petitioners' Brief at 14.

Also, in *State ex rel. Attorney General v. Pratt*, 68 So. 255 (Ala. 1915), a case involving the impeachment of a judge, the only mention of a sheriff was in the court's review of an earlier case regarding the impeachment of a sheriff. Although the *Pratt* court stated that a sheriff was "the highest purely executive officer of a county," *Id.* at 257, this statement is certainly not dispositive on the issue of sheriffs acting as policymakers for the county. Similar statements have been made in regard to other officers whose jurisdiction is limited to the county, yet who are clearly *state* officers. For example, Alabama District Attorneys have been defined as "the foremost representative[s] of the executive branch of government in the enforcement of the criminal law in [their] county." *Dickerson v. State*, 414 So. 2d 998, 1008 (Ala. Crim. App. 1982). However, there is no dispute over the fact that District Attorneys are officers of the state falling within the purview of the executive branch of government. *Id.*; *see Piggly Wiggly No. 208, Inc. v. Dutton*, 601 So. 2d 907 (Ala. 1992).

Finally, *First Mercury Syndicate, Inc. v. Franklin County*, 623 So. 2d 1075 (Ala. 1993) makes no mention whatsoever of policymaking officials for the county. Presumably, the Petitioners cite *Franklin* because the county paid for the sheriff's insurance. However, the fact that one county decides to provide insurance for its sheriff adds nothing to the argument that all sheriffs are final county policymakers with respect to law enforcement.

II. IN STATES LIKE ALABAMA, WHERE SHERIFFS ARE STATE OFFICERS FOR PURPOSES OF ELEVENTH AMENDMENT IMMUNITY, IT WOULD BE INCONSISTENT TO DEEM THEM ANYTHING OTHER THAN STATE POLICYMAKERS.

Beginning with *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658 (1978),[4] this Court has held that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent. . . . " *Monell*, 436 U.S. at 690 n.55. This Court made "explicit" what it previously only implied: "a judgment against a public servant 'in his official capacity' imposes liability on the entity he represents. . . . " *Brandon v. Holt*, 469 U.S. 464 (1985). The Court in *Brandon* noted that, for purposes of evaluating the liability of the City of New York, the opinion in *Monell* "clearly equated the actions of the Director of the Department in his official capacity with the actions of the city itself." *Id.* at 472 (footnote omitted).

This Court has consistently noted that a suit against a state official in his official capacity is in essence a suit against the state and is, therefore, barred by the Eleventh Amendment to the United States Constitution. A suit against a state official in his or her official capacity, "is not a suit against the official but rather is a suit against the official's office . . . [citation omitted]. . . . As such, it is

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[4] The *Amicus Curiae* realizes that *Monell* is an extremely significant case with respect to the question presented but, pursuant to Rule 37.1 of the *Rules of the Supreme Court of the United States*, the *Amicus Curiae* defers to the Respondent's brief for an extended discussion of *Monell* and its immediate relevancy to the issue of policymaking liability.

no different from a suit against the State itself." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989) (citations omitted); *see Hafer v. Melo*, ___ U.S. ___, 112 S. Ct. 358, 361 (1991). Thus, the Eleventh Amendment, which bars a damages action against a state in federal court would also bar an action against a state official sued for damages in his official capacity. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). This Court noted in *Graham* that this is so because a judgment against a public official, in his official capacity, " 'imposes liability on the entity that he represents'." *Id.* (*quoting Brandon*, 469 U.S. at 471).

In order for a governmental entity to be held liable for the actions of a particular official, the official, because of his office, must be vested with the authority to make policy. This is because a policymaker when setting policy for a governmental entity necessarily acts in his "official capacity". Thus, in order for an official to be considered a policymaker for a municipality, he must be a representative (i.e., agent or officer) of the municipality and must be vested by law, rule or ordinance to act for the municipality.

Federal courts, in interpreting the Eleventh Amendment, have consistently found Alabama sheriffs (executive officers of the state) and their deputies to be employees of the state and not the county. Consequently, suits against them in their official capacity are routinely dismissed based upon lack of jurisdiction. *See Dean v. Barber*, 951 F.2d 1210, 1215 n.5 (11th Cir. 1992); *Free v. Granger*, 887 F.2d 1552, 1557 (11th Cir. 1989); *Parker v. Williams*, 862 F.2d 1471, 1476 (11th Cir. 1989); *see also, Carr v. City of Florence, Ala.*, 916 F.2d 1521, 1527 (11th Cir. 1990) (Alabama sheriff's Eleventh Amendment immunity also

extends to deputy sheriffs). Even the district judge below did not dispute Sheriff Morgan's entitlement to Eleventh Amendment Immunity as an officer of the state.

The Petitioners' argument that sheriffs are policymakers for the county cannot be reconciled with the holding that an Alabama sheriff is a representative and officer of the State of Alabama for purposes of the Eleventh Amendment. A public servant cannot serve two masters at the same time for the same function. A sheriff in Alabama, therefore, is necessarily a policymaker for the state and not the county. It appears that the majority of jurisdictions which have considered both questions – Eleventh Amendment coverage and policymaking status – have ruled consistently: either the sheriff, in matters of law enforcement, is a state policymaker also receiving Eleventh Amendment protection in his official capacity, or, the sheriff is a county policymaker and does not receive Eleventh Amendment immunity. *Compare Swint v. City of Wadley, Ala.*, 5 F.3d 1435 (11th Cir. 1993), *opinion modified*, 11 F.3d 1030 (11th Cir. 1994) with *Dean, Parker, Free,* and *Carr, supra* (Alabama sheriffs are state policymakers for purposes of law enforcement and receive Eleventh Amendment immunity); *Thompson v. Duke*, 882 F.2d 1180 (7th Cir. 1989), *cert. denied*, 495 U.S. 929 (1990) (Illinois county not liable for sheriff's jail policies) and *Scott v. O'Grady*, 975 F.2d 366, 371 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2421 (1993) (Illinois sheriffs receive Eleventh Amendment immunity); *Davis v. Mason County*, 927 F.2d 1473 (9th Cir.), *cert. denied*, 112 S. Ct. 275 (1991) with *Danzer v. Cowlitz County Superior Court*, 911 F.2d 737

(9th Cir. 1990) (Washington sheriffs are county policymakers and do not receive Eleventh Amendment protection); *Lucas v. O'Loughlin*, 831 F.2d 232, 234-35 (11th Cir. 1987), *cert. denied*, 485 U.S. 1035 (1988) with *Hufford v. Rogers*, 912 F.2d 1338 (11th Cir. 1990), *cert. denied*, 499 U.S. 921 (1991) (Florida sheriffs are county policymakers and do not receive Eleventh Amendment protection); *But compare Himple v. Moore*, 673 F.Supp. 758, 759 (E.D. Va. 1987) (Virginia sheriffs are not final county policymakers) with *Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994) (Virginia sheriffs in their official capacities are *not* protected by Eleventh Amendment); *Ruehman v. Sheahan*, Nos. 93-4031, 94-1333, 1994 WL 479501 (7th Cir. Sept. 6, 1994) (Illinois sheriffs do not receive Eleventh Amendment immunity where state law leaves them discretion).

III. THE SIXTH CIRCUIT'S CONCLUSIONS AS TO THE STATUS OF SHERIFFS UNDER OHIO LAW IN *PEMBAUR* DOES NOT CONTROL EITHER THE ELEVENTH CIRCUIT'S OR THIS COURT'S ANALYSIS OF SHERIFFS UNDER ALABAMA LAW.

A. This Court, in reversing the Sixth Circuit in *Pembaur*, did not review the Sixth Circuit's determination as to whether Ohio sheriffs were county policymakers, but merely deferred to the court of appeals' interpretation of state law.

The Petitioners and their *amici* contend that this Court's holding in *Pembaur v. City of Cincinnati* controls the question in the instant case. However, that is not the case. Instead, this Court in *Pembaur* refused to delve into

the minutiae of Ohio state law and re-examine the Sixth Circuit's basis for holding Ohio counties liable for the misconduct of sheriffs and prosecutors. Instead, the Court merely accepted the Sixth Circuit's determination as being the "definitiv[e] constru[ction] . . . " of Ohio law and proceeded to analyze the county's liability under § 1983, taking the Sixth Circuit's determination as a given. 475 U.S. at 491. (O'Connor, J., concurring). Justice Brennan, in writing for the majority, consistently referred to the description of Ohio sheriffs as final county policymakers as being the Sixth Circuit's conclusion, and not the conclusion of this Court.

> Based upon *its* examination of Ohio law, the *Court of Appeals* found it "clea[r]" that the Sheriff and the Prosecutor were both county officials authorized to establish "the official policy of Hamilton County" with respect to matters of law enforcement.

475 U.S. at 476 (citation omitted) (emphasis added); *see also* 475 U.S. at 484. ("[T]he *Court of Appeals* concluded, based upon *its* examination of Ohio law . . . ") (emphasis added). Because the Sixth Circuit's determination on the issue of final policymaking authority necessarily arises out of state law, 475 U.S. 483, this Court, as is its practice in matters involving state law, afforded the determination "great deference." 475 U.S. 484 n.13 (*citing United States v. S.A. Empressa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 815, n.12 (1984); *Brockett v. Spokane Arcades, Inc.* 472 U.S. 491, 499-500 (1985) (citing cases); *Bishop v. Wood*, 426 U.S. 341, 345-347 (1976)). Deference to the courts of appeals' expertise in handling state law questions with respect to policymaking authority also is

evident in *Jett v. Dallas Indep. School Dist.* 491 U.S. at 738 ("We think the Court of Appeals, whose expertise in interpreting Texas law is greater than our own, is in a better position to determine whether [the defendant] possessed final policymaking authority. . . . ").

B. If the Sixth Circuit in *Pembaur* had analyzed Ohio sheriffs under the "right to control" paradigm propounded by the Respondent, arguably, the result would not have changed: Ohio law does in fact give county governments significant control over sheriffs.

Although Ohio sheriffs, like their Alabama counterparts, are elected by county electors and look to county government for fiscal support, there are significant distinctions. In contrast to Alabama sheriffs who hold a reporting duty to the governor and are supervised by state circuit judges, *see supra*, Ohio sheriffs are required to make certain reports directly to the Ohio county governmental units. Ohio Rev. Code Ann. § 311.16 (Anderson 1988). While Alabama law directs sheriffs' vacancies to be filled by the governor, Ohio county commissions have the power to fill vacancies in the sheriff's office. *See State ex rel. Grace v. Bd. of Elections of Franklin County*, 78 N.E.2d 38 (Ohio 1948).

IV. REQUIRING A SUBSTANTIVE "RIGHT TO CONTROL" BEFORE IMPOSING COUNTY LIABILITY IS SUPERIOR TO THE "ORIGIN OF SALARY/ GEOGRAPHIC JURISDICTION" LITMUS TEST PROPOSED BY PETITIONERS.

Although this Court made it clear in *Pembaur, Praprotnik*, and *Jett*, that the determination as to whether a

particular local official was a policymaker for a particular governmental body was to be based exclusively on an examination of state law[5], this Court has nowhere articulated exactly what a lower court should look for in its examination of state law. In that sense, the Court in this case is facing a "blank slate" upon which it can draft guiding principles which federal courts can use in their examination of state law. Evidently, this was the very reason a writ of certiorari was granted. The circuit courts of appeals have attempted to formulate the guiding principles of state law but were unable to come to a consensus; two divergent (and arguably, mutually exclusive) conclusions were reached. The Sixth Circuit's decision in *Pembaur*[6] emphasized electoral base (county voters elect the sheriff) and fiscal support (county pays sheriff's department's salaries and pays for equipment) to find the sheriff was a county policymaker. The Eleventh Circuit, in the instant case, looked to more substantive issues, such as from where does the sheriff's law enforcement authority emanate (state government) and which governmental entity has the ability to control the sheriff and his policies (state government). The Petitioners argue, probably correctly, that the Sixth Circuit's "origin of fiscal support/electoral base" analysis favors their position while the Respondents emphasize the logic and practicality of the Eleventh Circuit's "right to control" model. Rarely does the Court face such clearly defined and well-

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[5] *See supra* at pp. 5-6 of this brief.

[6] Petitioners argue that this Court's opinion in *Pembaur* controls the issue of whether Alabama sheriffs are county or state policymakers; however, that issue was not before this Court in *Pembaur*.

articulated mutually exclusive alternatives. *Amicus curiae* Jefferson County, for the reasons stated below, finds the reasoning behind the "right to control" option far superior to the Sixth Circuit's analysis.

A. Applying the Petitioners' proposed test for determining whether particular officials are county or state policymakers to other Alabama officials illustrates the test's impracticality.

The Petitioners do not propose a workable standard or "bright line" for determining whether certain officers are final policymakers for the state or for the county. In Alabama many officials who are undoubtedly state officials are elected exclusively by county electors, are provided offices in the county courthouse, and receive at least a portion of their salary from the county. Adopting the Petitioners' "origin of salary/geographic jurisdiction" test would arguably bring a host of such officials under the umbrella of those who can create county liability by their conduct even though they have only de minimus contacts with the county and cannot be controlled by the county.

1. District Attorneys.

In Alabama, district attorneys are constitutional state officers of the executive branch, "the foremost representative of the executive branch of government in the enforcement of criminal law in [their] county."[7] *Dickerson v. State*,

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[7] *Compare* this description of district attorneys from *Dickerson* with the Petitioners' description of Alabama sheriffs:

414 So. 2d 998, 1008 (Ala. Crim. App. 1982); *see also Hooks v. Hitt*, 539 So. 2d 157, 159 (Ala. 1988) (district attorney and all in his employ are employees of state). Yet, in at least 23 of Alabama's 67 counties[8], district attorneys are elected exclusively by electors from a single county. Ala. Const. amend. 328, § 6.20; Ala. Code § 12-11-2 (1975). Although their primary salary comes from the state, district attorneys may receive supplements to their salaries from the county. Ala. Code § 12-17-220(d) (1975). Furthermore, district attorneys operate from an expense account known as the District Attorney's Fund, which is held by the county treasury. Ala. Code § 12-17-197 (1975). Like the sheriff, the county must also provide the District Attorney with an office, as well as a courtroom, and may also provide the District Attorney with "additional court supportive personnel, services, equipment, and furnishings." Ala. R.J. Admin. 3(A). "In the event the courthouse is inadequate to supply office rooms for such officer [as the District Attorney], the county commission may lease such office rooms in a convenient location in the county site *and pay rental from the county fund.*" Ala. Code § 11-3-11(a)(1) (1975) (emphasis added). Applying the Petitioners' simplistic litmus test would produce absurd results: the district attorneys from the twenty-three single

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"Within the county, the sheriff is the chief law enforcement officer. . . ." Petitioners' Brief at 18.

[8] In the other 44 counties, district attorneys like circuit judges are elected from multi-county judicial districts made up of two to five counties. Ala. Code § 12-11-2 (1975).

county judicial districts would arguably be county policymakers while district attorneys in the remaining seventeen judicial circuits (covering forty-four counties) would be state policymakers, or some sort of multi-county regional policymakers – with no substantive characteristics distinguishing the two.

2. Circuit and District Judges and Circuit Clerks.

Similarly, categorizing Alabama circuit judges and district judges as either state or county policymakers would be problematic under the Petitioners' suggested analysis. Both are considered members of the state's judicial branch. Ala. Const. amend. 328, § 6.01. However, both circuit and district court judges are elected by the electors within the boundaries of their judicial circuits or districts. Ala. Const. art. VI, amend. 328, § 6.13. Again, in twenty-three counties, the judicial circuit consists of a single county. *See supra*. Both circuit and district judges are paid by the state, Ala. Code §§ 12-17-30 (1975) (circuit court judge's salary) & 12-17-68 (1975) (district court judge's salary), but may receive a supplement paid from county funds. Ala. Code §§ 12-17-30, 12-17-68 (1975). Judges are also provided with courtrooms and offices in the county courthouse at the expense of the county commission. *See* Ala. Code §§ 11-14-9, 11-14-10, 11-12-13 (1975).

Similarly, circuit court clerks (hereafter "clerks") are elected for six-year terms by the electors of each county, and vacancies are filled by the circuit court judge with jurisdiction over the county where the clerk's office is

located. Ala. Const. art. VI, amend. 328, § 6.20(b). Clerks are paid by the State, Ala. Code § 12-17-80 (1975) (employees in the clerk's office have been paid by the State since October, 1977, and prior to that time by the county), and may receive local supplements pursuant to general or local act. Ala. Code § 12-17-81 (1975). Alabama Code § 12-18-92 (1975) authorizes counties to "pay a circuit clerk a supplemental salary from the general fund of such county." The office of the circuit clerk is located in the courthouse of the county. Ala. Code § 12-17-90 (1975).

3. Members of the County Boards of Education.

The county board of education is comprised of five members elected by the electors of the county. Ala. Code § 16-8-1(a) (1975). Board members are compensated a set amount for a maximum number of days per year from the public school funds of the county. Ala. Code § 16-8-5 (1975); *see* Ala. Code § 16-1-26 (1975) (county board members may be compensated at a higher rate pursuant to a local act and approval by a majority vote of the board). The "general administration and supervision of the public schools . . . of each county . . . shall be vested in the county board of education." Ala. Code § 16-8-8 (1975); *see Hutt v. Etowah County Bd. of Educ.*, 454 So. 2d 973 (Ala. 1984) (county boards are "charged by the legislature with the task of supervising public education within the counties"). "[T]he county board[s] of education [are] by and large the governing body of the county [educational] system. . . . " *Panther Oil & Grease Mfg. Co. v. Blount County Bd. of Educ.*, 134 So. 2d 220, 223 (1961). Despite the

fact that county boards of education solely govern such matters in the county, they are local agencies of the state and are, therefore, immune from suit. *Belcher v. Jefferson County Bd. of Educ.*, 474 So. 2d 1063 (Ala. 1985); *Hutt*, 454 So. 2d at 973 (striking down the plaintiff's contention that "a county school board, like a county commission, is nothing more than an involuntary political subdivision of a county, and, therefore, subject to suit."); *see also Enterprise City Bd. of Educ. v. Miller*, 348 So. 2d 782, 783 (Ala. 1977); *Sims v. Etowah County Bd. of Educ.*, 337 So. 2d 1310, 1316 (Ala. 1976).

B. The Respondents' "right to control" standard represents a more logical and practical approach and is consistent with tort liability theory.

The superiority of the Respondents' "right to control" analysis is evident in an examination of, not only Alabama sheriffs, but also the other local officials discussed above. Sheriffs, district attorneys, judges, and judicial clerks cannot set county policy because the county has no policy in the enforcement of criminal or civil actions. These officers are empowered to enforce or implement state law by the state's constitution or through state statutory enactments. Just as certainly as the state can expand or abolish each office, it can, by legislative pronouncement, restrain the officers' conduct. On the other hand, the county commission could pass a stack of resolutions purporting to establish policy for the particular officer which would have no legally binding effect; the resolutions could be ignored with impunity. Nor does the fiscal relationship between the county commission and

these officers provide any real control. The county is mandated by state law to provide the budgetary support described above.

Counties and their representative bodies, the county commissions, should only be held liable for the policies or conduct of officials under their control. Certainly, if the county commission or its road engineer condoned racially discriminatory policies in the distribution of road building or maintenance resources, the county could be held liable. *See Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992) (opining that although county commission's road decisions did not implicate the Voting Rights Act, discriminatory policies could be "actionable under a different remedial scheme.").

If the tripartite goals of 42 U.S.C. § 1983, similar to general tort law, is to compensate the victim of constitutional deprivations, punish the wrongdoer, and deter future conduct, the Petitioners' test will only "succeed" on the first count. Making counties liable for the misconduct of state officers the county cannot control will certainly add another "deep pocket" to the list of defendants. However, holding counties liable for the wrongdoing of actors outside of their control does nothing to punish the wrongdoer or deter future misconduct. Individual capacity suits for damages against the sheriff,[9] coupled with injunctive relief leveled against the state (the sheriff in his official capacity), accomplishes all three goals while leaving Alabama county commissions free to supervise matters within their legislative prerogative (i.e,

[9] *See Dean v. Barber*, 951 F.2d 1210 (11th Cir. 1992).

road construction) and allowing the state to supervise the officers which enforce its criminal code.

CONCLUSION

Based on the foregoing, Amicus Curiae, Jefferson County, Alabama, respectfully requests that this Court affirm the holding of the Court of Appeals of the Eleventh Circuit.

Respectfully submitted,

* CHARLES S. WAGNER
Assistant County Attorney
Office of Jefferson County Attorney
Jefferson County Courthouse,
Rm 202-A
716 21st Street North
Birmingham, Alabama 36253
(205) 325-5688
Counsel for Amicus Curiae

* *Counsel of Record*

September 30, 1994

CONSTITUTION OF THE UNITED STATES

[Amendment XI]

[*Restriction of Judicial Power*]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

ALA. CONST. of 1901 art. V, § 112

The executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county.

ALA. CONST. of 1901 art. V, § 121

The governor may require information in writing, under oath, from the officers of the executive department, named in this article, or created by statute, on any subject, relating to the duties of their respective offices, and he may at any time require information in writing, under oath, from all officers and managers of state institutions, upon any subject relating to the condition, management

and expenses of their respective offices and institutions. Any such officer or manager who makes a willfully false report or fails without sufficient excuse to make the required report on demand, is guilty of an impeachable offense.

ALA. CONST. of 1901 art. V, § 138

A sheriff shall be elected in each county by the qualified electors thereof, who shall hold office for a term of four years, unless sooner removed, and he shall be ineligible to such office as his own successor; provided, that the terms of all sheriffs expiring in the year nineteen hundred and four are hereby extended until the time of the expiration of the terms of the other executive officers of this state in the year nineteen hundred and seven, unless sooner removed. Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grievous bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached under section 174 of this Constitution. If the sheriff be impeached, and thereupon convicted, he shall not be eligible to hold any office in this state during the time for which he had been elected or appointed to serve as sheriff.

ALA. CONST. of 1901 art. VII, § 173

The governor, lieutenant-governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and justices of the supreme court may be removed from office for willful neglect of duty, corruption in office, incompetency, or intemperance in the use of intoxicating liquors or narcotics to such an extent, in view of the dignity of the office and importance of its duties, as unfits the officer for the discharge of such duties, or for any offense involving moral turpitude while in office, or committed under color thereof, or connected therewith, by the senate sitting as a court of impeachment, under oath or affirmation, on articles or charges preferred by the house of representatives. When the governor or lieutenant-governor is impeached, the chief justice, or if he be absent or disqualified, then one of the associate justices of the supreme court, to be selected by it, shall preside over the senate when sitting as a court of impeachment. If at any time when the legislature is not in session, a majority of all the members elected to the house of representatives shall certify in writing to the secretary of state their desire to meet to consider the impeachment of the governor, lieutenant-governor, or other officer administering the office of governor, it shall be the duty of the secretary of state immediately to notify the speaker of the house, who shall, within ten days after receipt of such notice, summon the members of the house, by publication in some newspaper published at the capitol, to assemble at the capitol on a day to be fixed by the speaker, not later than fifteen days after the receipt of the notice to him from the secretary of state, to consider the impeachment

of the governor, lieutenant-governor, or other officer administering the office of governor. If the house of representatives prefer articles of impeachment, the speaker of the house shall forthwith notify the lieutenant-governor, unless he be the officer impeached, in which event he shall notify the secretary of state, who shall summon, in the manner herein above provided for, the members of the senate to assemble at the capitol on a day to be named in said summons, not later than ten days after receipt of the notice from the speaker of the house, for the purpose of organizing as a court of impeachment. The senate, when thus organized, shall hear and try such articles of impeachment against the governor, lieutenant-governor, or other officer administering the office of governor, as may be preferred by the house of representatives.

ALA. CONST. of 1901 art. VII, § 174

The chancellors, judges of the circuit courts, judges of the probate courts, and judges of other courts from which an appeal may be taken directly to the supreme court, and solicitors and sheriffs, may be removed from office for any of the causes specified in the preceding section or elsewhere in this Constitution, by the supreme court, under such regulations as may be prescribed by law. The legislature may provide for the impeachment or removal of other officers than those named in this article.

ALA. CONST. of 1901 art. VII, § 175

The clerks of the circuit courts, or courts of like jurisdiction, and of criminal courts, tax collectors, tax assessors, county treasurers, county superintendents of education, judges of inferior courts created under authority of section 168 of this Constitution, coroners, justices of the peace, notaries public, constables, and all other county officers, mayors, intendants, and all other officers of incorporated cities and towns in this state, may be removed from office for any of the causes specified in section 173 of this Constitution, by the circuit or other courts of like jurisdiction or a criminal court of the county in which such officers hold their office, under such regulations as may be prescribed by law; provided, that the right of trial by jury and appeal in such cases shall be secured.

ALA. CONST. of 1901 amend. No. 35 (amending art. V, § 138)

A sheriff shall be elected in each county by the qualified electors thereof who shall hold office for a term of four years, unless sooner removed, and he shall be eligible to such office as his own successor. Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grevious [grievous] bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff

may be impeached, under section 174 of this Constitution. If the sheriff be impeached, and thereupon convicted, he shall not be eligible to hold any office in this state during the time for which he had been elected or appointed to serve as sheriff.

ALA. CONST. of 1901 amend. No. 328, § 6.20

(a) A district attorney for each judicial circuit shall be elected by the qualified electors of those counties in such circuit. Such district attorney shall be licensed to practice law in this state and shall, at the time of his election and during his continuance in office, reside in his circuit. His term of office shall be for six years and he shall receive such compensation as provided by law. Vacancies in the office of district attorney and in his staff shall be filled as provided by law.

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(10)

No. 93-1636

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

TOM SWINT, TONY SPRADLEY, DRUCILLA JAMES and JEROME LEWIS,
Petitioners,
v.
CHAMBERS COUNTY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT CHAMBERS COUNTY COMMISSION

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

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QUESTION PRESENTED

Whether a county government is liable under § 1983 for a sheriff's law enforcement decisions, where state law does not vest law enforcement authority in the county government and makes the sheriff a state officer.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—Continued

Statutes

Constitutional Provisions

Other Authorities

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT CHAMBERS COUNTY COMMISSION

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* have a compelling interest in legal issues that affect state and local governments.

One of the essential attributes of state sovereignty is the prerogative to decide how to allocate governmental authority. *See Gregory v. Ashcroft*, 111 S.Ct. 2395, 2400 (1991). As the Court noted in *Gregory*, "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as sovereign." *Id.* Among the most fundamental decisions for a State are those it makes regarding whether to vest a particular governmental authority (such as law enforcement) in an entity of local government or in state officials.

The court of appeals' decision correctly recognized that Alabama has not vested law enforcement authority in county governments and that Alabama's sheriffs are executive officers of the State. *See* Pet. App. 32a-34a. Chambers County, like most other county governments, has been granted only limited authority by the State. County governments' revenue raising powers are also commonly structured in accordance with the other powers which they have been granted. Indeed, in several respects, Chambers County, with its limited population (36,876 people, *see 1992 County and City Extra—Annual Metro, City and County Data Book* 36 (Courtenay M. Slater & George E. Hall eds. 1992)) and revenues ($6 million in the fiscal year ending September 30, 1993, *see* State Of

Alabama, Department of Examiners of Public Accounts, *Financial Statement: All Counties* 24 (1994)), is typical of this nation's counties. Of the nation's 3,042 county governments, three-fourths have a population of less than 50,000 and more than half have a population of less than 25,000. 4 U.S. Department of Commerce, Bureau of the Census, *1987 Census of Governments* 26 (Table 12) (1990). Budgets for these county governments are extremely limited. As reported by the Census Bureau, the average annual own source revenue (i.e., revenue from taxes and user fees) for county governments is $5.07 million for counties with a population of less than 50,000 people and $3.66 million for counties with less than 25,000 people. *Id.*

Given the limited fiscal resources of most county governments, the adoption of petitioners' criteria for imposing liability has potentially grave consequences for counties and their ability to provide essential services to their citizens. Accordingly, *amici* submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

Amici adopt respondent's statement.

SUMMARY OF ARGUMENT

1. In *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978), the Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961), and held that local governments are suable as "persons" under § 1983. In doing so, the Court relied principally on the common law understanding that the corporation was an artificial person and the Dictionary Act's rule of construction that "the word 'person' may extend and be applied to bodies politic and corporate." *See Monell*, 436 U.S. at 687-88 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431). This common law understanding recognized, however, that corporations possessed only

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

those powers conferred on them by their charters. As the Court noted in *Railroad Co. v. Harris*, 79 U.S. (12 Wall.) 65, 81 (1870), "[t]he chief point of difference between the natural and the artificial person is that the former may do whatever is not forbidden by law; the latter can do only what is authorized by its charter."

This principle applied as well to municipal corporations. *See* John F. Dillon, *Treatise On The Law Of Municipal Corporations* § 9, at 29 (1872). As a general rule, municipal corporations were not liable when their officers acted "outside of the powers of the corporation." *Id.* § 767, at 725. As the Court has recognized, the members of the Forty-Second Congress (which enacted § 1983) were well versed in the common law and "likely intended [its] principles to obtain, absent specific provisions to the contrary." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). Accordingly, a local government is suable as a "person" under § 1983 only to the extent the entity exercises powers granted to it by the State.

This construction of the term "person" is likewise supported by the debate which culminated in the House of Representatives' rejection of the Sherman Amendment. Numerous representatives recognized that the Amendment, which proposed to provide a cause of action against local governments for failing to prevent riots and mobs acting with the intent to deprive citizens of their civil rights, was patently unfair because many local governments had not been granted the authority under state law to keep the peace. *See generally* Cong. Globe, 42d Cong., 1st Sess., 791-95 (1871). As the members of the Forty-Second Congress recognized, States are not required to vest law enforcement authority in county governments. Whether they have done so is a question which must be answered before answering the question of whether a particular official is a county's final policymaker.

As this Court has noted, one of the main functions of Alabama county governments "is to supervise and

control the maintenance, repair, and construction of the county roads." *Presley v. Etowah County Comm'n*, 112 S.Ct. 820, 824 (1992). Alabama counties' other principal functions are largely limited to erection of county courthouses, jails, and hospitals. *See* Ala. Code § 11-14-10. And as the court of appeals recognized, Alabama has not granted counties law enforcement authority, e.g., the method of selection, funding, and absence thus properly held that Chambers County was not liable for the sheriff's decisions under § 1983.

2. In challenging the court of appeals' holding that Chambers County could not be held liable for the sheriff's activities because it does not have law enforcement authority, petitioners argue that it is the common understanding that sheriffs exercise county power and thus make county policy when they engage in the enforcement of state law. Contrary to petitioners' suggestion, the sheriff, when acting as a conservator of the peace, has always been viewed as exercising "the sovereignty of the State." 1 Walter H. Anderson, *A Treatise On The Law Of Sheriffs, Coroners And Constables* § 6, at 5 (1941). Sheriffs were frequently constitutional officers of the State and remain so today in several States, including Alabama. *See, e.g.*, Ala. Const. art. V, § 112; La. Const. art. V, § 27. Sheriffs were commonly subject to removal from office through either the State's impeachment procedure or removal by the governor or both. Alabama follows this tradition by making its sheriffs members of the State's executive department and subjecting them to impeachment proceedings initiated by the Governor and adjudicated by the state Supreme Court. *See* Ala. Const. art. V, § 112; art. VII, §§ 173-74.

None of the criteria which petitioners and their *amici* rely upon to argue that the sheriff exercises county authority, e.g., the method of selection, funding, and absence of any county official who reviews the sheriff's decisions, alters the status of Alabama's sheriffs as constitutional officers of the State who, in enforcing state law, exercise state authority. At the time of § 1983's enactment, it

was "the usual practice . . . for the people of the several counties to elect sheriffs at regular intervals." 2 *Bouvier's Law Dictionary* 518 (1868). Nonetheless, it was the common understanding then as now, that the sheriff, as conservator of the peace, exercises the sovereign's authority. Likewise, the requirement that the county fund the sheriff's office does not alter this settled understanding. Historically, the sheriff was not financially supported by the sovereign but was still understood as exercising sovereign authority. Moreover, sheriffs are commonly assigned numerous duties, such as serving court process and subpoenas issued by state agencies and legislatures. *See, e.g.*, Ala. Code § 36-22-3(1). Adopting petitioners' view could result in the imposition of liability on the county for a sheriff's unconstitutional service of a state-issued subpoena even though the county has no authority with respect to such matters.

Finally, that Chambers County's board of commissioners does not have authority to review the sheriff's law enforcement decisions does not prove that the latter makes county policy. To the contrary, the absence of such authority is entirely consistent with the State's related decisions not to grant counties law enforcement authority and to make sheriffs constitutional officers of the State's executive department.[2]

ARGUMENT

A SHERIFF IS NOT A COUNTY POLICYMAKER FOR LAW ENFORCEMENT PURPOSES WHERE STATE LAW DOES NOT GRANT THE COUNTY LAW ENFORCEMENT AUTHORITY AND MAKES THE SHERIFF A STATE OFFICER

In *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978), this Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961), to the extent it had held that local governments were not suable as "persons" under 42 U.S.C. § 1983. The Court, however, rejected the view that

[2] *Amici* note that sheriffs are suable under § 1983 in their individual capacities, as was done here. *See Kentucky v. Graham*, 473 U.S. 159 (1985).

§ 1983 imposes *respondeat superior* liability, holding that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." 436 U.S. at 694. After consideration of § 1983's text and legislative history, the Court concluded that "Congress did not intend [local governments] to be held liable unless action pursuant to official [local government] policy of some nature caused a constitutional tort." *Id.* at 691. As the Court stated, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

Relying on dictum in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 n.12 (1986), petitioners and their *amici* argue that the sheriff of Chambers County is the County's final policymaker with respect to law enforcement authority notwithstanding that Alabama law does not vest the County with law enforcement authority. According to petitioners, liability can be imposed on the corporate entity of the County because "sheriffs are elected by the residents of their respective counties, . . . receive their salary and expenses from their respective counties . . . . [and] serve as the chief law enforcement officers in the counties inasmuch as their decisions are final and unreviewable within their counties and state law confers on them the duty to enforce the law 'in their respective counties.'" Pet. Br. 12-13 (citations omitted); *see also* Br. *Am. Cur.* United States 9 ("Because the county is required by state law to pay the sheriff and to fund all the operations of the sheriff's office, it is also clear that the county government is properly viewed as having authority in regard to county law enforcement activities for purposes of Section 1983.").

As *amici* explain below, the court of appeals' holding that Chambers County could not be sued under § 1983 because "the State has not assigned the counties any law enforcement authority" and "the sheriff [was] not exercising county power," Pet. App. 33a-34a, is manifestly correct as a matter of statutory construction. Indeed, the Forty-Second Congress expressly rejected the very form of liability which petitioners urge this court to impose—i.e., liability on the corporate entity of a local government when the State has not granted it authority to act. Likewise, petitioners' criteria for imposing liability do not establish the nature of the authority the sheriff exercises in enforcing state law. While sheriffs have frequently been called county officers, their duties involve the exercise of a wide variety of functions, many of which involve the exercise of state rather than county authority. Alabama merely follows the settled understanding that the sheriff, as conservator of the peace, exercises the sovereign's authority. Contrary to the suggestions of petitioners and their *amici*, when, as here, sheriffs exercise state authority, their acts cannot "fairly be said to represent" a local government's official policy so as to establish "that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694. The Court should therefore reject petitioners' attempt to impose on respondent and its citizens the vicarious liability which the Court rejected in *Monell*.

A. A Local Government Cannot Be Sued Under § 1983 For Unconstitutional Policies When It Has No Authority To Make Such Policies

1. Section 1983 renders liable "[e]very person who, under color of [state law], subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. The court of appeals held that Chambers County was not suable under § 1983 because in the absence of the State having granted law enforcement authority to the County, the Sheriff could not be deemed to be "exercising county power." Pet. App. 34a. This holding is manifestly correct as a matter of statutory construction.

In *Monell*, this Court overruled its decision in *Monroe* to the extent the latter had held that a local government

was not suable as a "person" under § 1983. In concluding that § 1983's use of the term "person" included municipal corporations and local governments, the Court relied principally on the common law understanding of the nature of the corporation and the Dictionary Act's rule of construction that "the word 'person' may extend and be applied to bodies politic and corporate." *See Monell*, 436 U.S. at 687-88 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431). But while by 1871, the corporation was treated as a natural person and citizen of a State for the purposes of establishing the diversity jurisdiction of the federal courts, *see id.* (citations omitted), the corporation was always recognized as being an artificial person with only those powers which were conferred on it by its charter. *See, e.g., Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). Consistent with this understanding, the Court noted shortly before the enactment of § 1983:

> A corporation is in law, for civil purposes, deemed a person. It may sue and be sued, grant and receive, and do all other acts not *ultra vires* which a natural person could do. The chief point of difference between the natural and the artificial person is that the former may do whatever is not forbidden by law; the latter can do only what is authorized by its charter.

Railroad Co. v. Harris, 79 U.S. (12 Wall.) 65, 81 (1870); *see also Fertilizing Co. v. Hyde Park*, 97 U.S. (7 Otto) 659, 666-67 (1878) ("powers and immunities" of artificial person "depend primarily upon the law of its creation").

At the time of § 1983's enactment, it was likewise settled that municipal corporations "possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them, or other statutes applicable to them." John F. Dillon, *Treatise On The Law Of Municipal Corporations* § 9, at 29 (1872). As Judge Dillon explained:

> It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in *express words;* second, those *necessarily or fairly implied* in, or *incident* to, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation, nor its officers, can do any act, or make any contract, or incur any liability, not authorized thereby. All acts beyond the scope of the powers granted are void. Much less can any power be exercised, or any act done, which is forbidden by statute. These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations.

Id. § 55, at 101-02. *See also* Howard S. Abbott, *A Summary Of The Law Of Public Corporations* § 21, at 20-21 (1908) (A public corporation "takes nothing by its charter but what is plainly and unequivocally granted. This is especially true of all those powers, the exercise of which, if liberally considered, might lead to the placing of illegal, unjust or burdensome obligations upon the taxpayers of the community.").[3]

[3] A corollary of this principle is the *ultra vires* doctrine, which was also well established at the time of Section 1983's enactment. As Judge Dillon wrote in 1872:

> The principle that a municipal corporation is bound by the acts of its officers only when within the charter or scope of their powers, and that acts outside of the powers of the corporation, or of the officers appointed to act for it, are void as respects the corporation, is vital; and the opposite doctrine has no support in reason, and very little, if any, in the judgments of the courts.

Dillon, *The Law Of Municipal Corporations* § 767, at 725. *See also* 1 Charles F. Beach, Jr., *Commentaries On The Law Of Public Corporations* § 592, at 607-08 (1893) ("Acts of municipal corporations which are done without power expressly granted, or fairly

As the Court has recognized, the members of the Forty-Second Congress were well versed in the common law and "likely intended [its] principles to obtain, absent specific provisions to the contrary." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981); *see also Heck v. Humphrey*, 114 S.Ct. 2364, 2370-71 (1994); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 67 (1989) (collecting cases). The Court has likewise noted that § 1983 "is to be read 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.'" *Burns v. Reed*, 500 U.S. 478, 484 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)). Those principles demonstrate that under § 1983, local governmental entities act as "persons" only to the extent their putative officers and agents exercise powers which the State has granted to them. A local government is thus suable as a "person" under § 1983 only to the extent the entity exercises powers granted to it by the State.

This construction of the term "person" is also supported by the Forty-Second Congress' acknowledgment and endorsement of the common law principles applicable to municipal corporations in rejecting the conference committee's draft of the Sherman Amendment.[4] As the Court

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to be implied from the powers granted or incident to the purposes of their creation, are *ultra vires.*").

Today it is still the general rule that "in order to render a municipal corporation liable, the acts complained of must have been in the exercise of some power conferred on it by its charter or other positive enactment." 18 Eugene McQuillin, *The Law Of Municipal Corporations* § 53.60, at 379 (Stephen M. Flanagan ed.) (3d ed. 1984). Likewise, with respect to the torts of a municipal corporation's officers, it "is well settled that if the alleged tort is in connection with an act which is wholly ultra vires, i.e., beyond the scope of the power of the municipality, no liability for damages arises, as against the municipality." *Id.*

[4] The conference committee's draft of the Sherman Amendment provided a cause of action against local governments to persons injured by

> any persons riotously and tumultuously assembled together . . . with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude . . . .

Monell, 436 U.S. at 703 (quoting Cong. Globe, 42d Cong., 1st Sess., 749, 755 (1871)). This version not only rendered local governments liable but provided the injured person with collection remedies such as attachment, garnishment and mandamus against the local government itself. *Id.* at 703-04 (quoting Cong. Globe at 749, 755). The debate focused on this version, which was added in conference after "[t]he House refused to acquiesce in a number of amendments made by the Senate, including the [original] Sherman amendment" to H.R. 320. *Id.* at 666.

The original version of the Sherman Amendment placed liability on the "inhabitants of the county, city, or parish" and arguably subjected their property to levy rather than that of the local government. *See id.* This amendment was added to H.R. 320 immediately prior to the Senate's vote on the measure; under the Senate rules, debate was not allowed on it. *Id.*

noted in *Monell*, the Sherman Amendment—which proposed to provide a cause of action against local governments to persons injured in either their person or property by rioters or mobs acting with the intent to deprive them of their civil rights—was the subject of vigorous debate in the House of Representatives which rejected it. *See* 436 U.S. at 666-69.

The principal objection to the Amendment was that it imposed liability on local governments for failing to keep the peace even though under the constitutional doctrine of the era, the federal government had no authority to impose duties on state officers, *see, e.g., Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), and even though local governments frequently had not been granted the authority to keep the peace under state law. *See Monell*, 436 U.S. at 673. Numerous lawmakers noted this infirmity in the legislation during the floor debate in the House. For example, Representative Willard stated:

> In most of the States—it is so in mine, I know—the counties and the towns have no power whatever

> in this regard except as those powers have been conferred upon them by the State; and these powers can be taken from them at any time by the State. If these powers are not given to them by the State, or if they hold them only at the will of the State, what justice is there in making the town, city, or parish liable for not protecting the property of the citizens, when perhaps no laws for its protection exist; for not giving me protection when they have not been clothed by the State with the right and power to give me protection?

Cong. Globe, 42d Cong., 1st Sess. 791 (1871). In a similar vein, Representative Poland stated his objection:

> Counties and towns are subdivisions of the State government, and exercise in a limited sphere and extent the powers of the State delegated to them; they are created by the State for the purpose of carrying out the laws and policy of the State, and are subject only to such duties and liabilities as State laws impose upon them. In a sense they are corporations, but with only such powers and subject to such burdens as the State may deem advisable.

Id. at 794. Representative Blair, to whom the Court in *Monell* attributed the most complete statement of opposition, *see* 436 U.S. at 673, added:

> [The Sherman Amendment] claims the power in the General Government to go into the States . . . and lay such obligations as it may please upon the municipalities, which are the creations of the States alone. Now, sir, that is an exceedingly wide and sweeping power. I am unable to find a proper foundation for it. . . . [T]here are certain rights and duties that belong to the States, . . . there are certain powers that inhere in the State governments. They create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot . . . tell me where its power will stop and what obligations it might not lay upon a municipality. . . . The State has made these municipalities for certain objects. It has not made them for the purpose of meeting this obligation which the Government of the United States under this bill would seek to interpose and lay upon them . . . .

Id. at 795. And of particular relevance in assessing petitioners' contention that Chambers County should be held liable for the sheriff's actions notwithstanding that the State has not granted it law enforcement authority, are the comments of Representative Burchard:

> . . . there is no duty imposed by the Constitution of the United States, or usually by State laws, upon a county to protect the people of that county against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person. Police powers are not conferred upon counties as corporations; they are conferred upon cities that have qualified legislative power. . . . But counties are organized, at least in most of the States, for the management of the financial affairs of the counties. The county commissioners, county court, board of supervisors, or other body acting for the county, have power to levy taxes, but they do not have any control of the police affairs of the county and the administration of justice. These powers, I grant, are conferred in part by State laws upon some elective officers, such as the sheriff of a county, or justices of the peace and constables in the subdivisions of the counties and towns, &c. But still in few, if any, States is there a statute conferring this power upon the counties. Hence it seems to me that these provisions attempt to impose obligations upon a county for the protection of life and person which are not imposed by the laws of the State, and that it is beyond the power of the General Government to require their performance.

Id.

As the foregoing demonstrates, the members of the Forty-Second Congress were well aware of the common law principle that local governments possess only the authority which the State has vested in them. Section 1983 must be construed with this principle in mind. The subsequent rejection of the Sherman Amendment—on the ground that the Federal Government could not impose an obligation on local governments where the States themselves had not vested such authority in the local governmental entity—renders unassailable the conclusion that absent a grant of authority from the State to engage in a particular function, a local government does not make policy so as to subject it to *Monell* liability. Put another way, a local government is a "person" only with respect to those powers which the State has vested in it.[5] And as

[5] This construction of the term "person" is also supported by the common law principles applicable to the suability of county governments. Unlike municipal corporations, created with the consent of their inhabitants, counties were created by the State without the consent of their citizenry and thus were considered to be "involuntary quasi corporations." Dillon, *Treatise On The Law Of Municipal Corporations* § 10, at 31 n.1. As such they were viewed as being "purely auxiliaries of the state." *Id.* at 32-33. As Judge Dillon added, "to the general statutes of the state [counties] owe their creation, and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject." *Id.* at 33.

Counties were not suable in the same manner as municipal corporations. As Judge Dillon wrote:

> many of the courts have drawn a marked line of distinction between municipal corporations and *quasi* corporations, [with] respect to their liability, to persons injured by their neglect of duty: holding the former liable, without an express statute giving the action, in cases in which the latter are not considered liable unless made so by express legislative enactment.

Id. (emphasis in original). *See also id.* at 31-32 n.1 (quoting *Hamilton County v. Mighels*, 7 Ohio St. 109, 118-24 (1857)).

Professor Cooley likewise explained that counties were not "persons" in the same manner as municipal corporations:

> The municipal corporation is the only representative of the strict and complete public corporation; it is represented in our cities, boroughs, towns, and villages, whether incorporated

Justice O'Connor's plurality opinion in *City of St. Louis v. Praprotnik* noted:

> The States have extremely wide latitude in determining the form that local government takes, and local preferences have led to a profusion of distinct forms. Among the many kinds of municipal corporations, political subdivisions, and special districts of all sorts, one may expect to find a rich variety of ways in which the power of government is distributed among a host of different officials and official bodies.

485 U.S. 112, 124-25 (1988). The States are not required by either § 1983 or the U.S. Constitution to vest law enforcement authority in county or other local governments. Whether they have done so is a question which must necessarily be resolved before answering the question of whether a particular official is a county's final policymaker. And it is likewise a question of state law on which the court of appeals should receive considerable deference. *Cf. Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 738 (1989).

Here, the answer is clear. Alabama has granted counties only narrow and defined authority. *See* Ala. Code §§ 11-3-10, 11-3-11 (listing county powers). As this Court has noted, one of the main functions of Alabama

> under general or special laws. As intimated above counties . . . are not municipal corporations, but only quasi corporations, with limited statutory powers and liabilities, and not subject to the doctrines of law peculiarly applicable to municipal corporations.

Roger W. Cooley, *Handbook Of The Law Of Municipal Corporations* § 5, at 14 (1914). *See also* Abbott, *A Summary Of The Law Of Public Corporations* § 530, at 529 ("Since the government of a quasi corporation is ordinarily imposed by the sovereign, its business and private relations simple[,] and further, because it performs solely governmental duties, the universal rule obtains that no liability exists in respect to the performance of its duties and obligations unless one is expressly imposed by statute.") (footnote omitted); *Soper v. Henry County*, 26 Iowa 264, 268, 270 (1868); *Hedges v. County of Madison*, 6 Ill. (1 Gilm.) 567, 570 (1844).

county governments "is to supervise and control the maintenance, repair, and construction of the county roads." *Presley v. Etowah County Comm'n,* 112 S. Ct. 820, 824 (1992). Alabama county governments' other principal functions are largely limited to the erection of county courthouses, jails, and hospitals. *See* Ala. Code § 11-14-10. And as the court of appeals recognized, Alabama has not granted counties law enforcement authority. *See* Pet. App. 33a-34a. The court of appeals' holding that the county was not suable under § 1983 for the sheriff's "policymaking" was therefore correct as a matter of statutory construction.

2. In rejecting the court of appeals' holding that the County cannot be held liable for the Sheriff's activities because it does not have law enforcement authority, neither petitioners nor their *amici* make any attempt to reconcile their expansive view of local government liability with § 1983's text, the common understanding of its meaning, or its legislative history. Instead, petitioners and the United States rely on dictum in *Pembaur* to make the generic argument that its plurality opinion "reflected the common understanding of sheriffs as local policymakers when it stated that 'decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to [local governmental] liability.'" Pet. Br. 7 (quoting 475 U.S. at 483 n.12) (emphasis and brackets in original); *see also* Br. *Am. Cur.* U.S. 16-18. Indeed, petitioners and the United States read *Pembaur* as establishing a sweeping federal rule that where a sheriff is elected by county residents and receives funding from the county, the sheriff is a county policymaker so as to subject the county to liability for his unconstitutional acts regardless of applicable state law which makes that officer a member of the State's executive department. *See* Pet. Br. 12-17, 20-22; Br. *Am. Cur.* United States 16-18.

Pembaur, however, did not establish as a matter of federal law either a general proposition that a sheriff is

a county policymaker with respect to law enforcement practices, or a more specific proposition that where a sheriff is elected by county voters and receives funding from the county treasury, the sheriff is a county policymaker. Rather, the *Pembaur* plurality stands for only the limited principle that a single decision or act by an official vested with the authority to make local government policy could establish the existence of a policy, a majority of the Court (including the plurality) having relied on the holding of the Sixth Circuit that, under state law, the sheriff was the county's policymaker with respect to law enforcement activities. *See* 475 U.S. at 471, 476, 484-85 (citing *Pembaur v. City of Cincinnati,* 746 F.2d 337, 340-41 (6th Cir. 1984)). And as *amici* explain below, there is no basis for either a uniform federal rule that sheriffs exercise county power and thus make county policy when they engage in the enforcement of state law or a rule establishing petitioners' criteria as the test for whether a sheriff exercises county power.

B. In The Absence Of A Grant By The State Of Law Enforcement Authority To The County, A Sheriff Does Not Make County Policy When Enforcing State Law

According to petitioners, it "simply cannot be the case" that a county sheriff makes law enforcement policy for the State rather than the county itself. *See* Pet. Br. 17. Noting the derivation of the term sheriff from the Saxon words "scyre" (as in shire or county) and "reve" (for keeper), petitioners assert that "sheriffs traditionally have been considered county policymakers and the chief law enforcement officers not for their states, but for their counties." *Id.* at 18.

The authorities petitioners rely on, however, do not establish anything more than that sheriffs exercise their powers within the boundaries of a county. *See id.* at 18-19. But this truism certainly does not answer the question of whose authority the sheriff exercises in enforcing state law. Moreover, it is impossible to reconcile

petitioners' assertion that sheriffs have traditionally exercised county authority (and therefore make county policy) with the Forty-Second Congress' rejection of the Sherman Amendment on the grounds that many units of local government had not been granted authority to keep the peace. *See Monell*, 436 U.S. at 673-81; *see also supra* pp. 10-14. Indeed, it is ironic that petitioners note the Saxon derivation of the term "sheriff" while ignoring more than one thousand years of understanding that the sheriff, as conservator of the peace, exercises the sovereign's authority.

As several leading commentators noted well before the enactment of § 1983, "[t]he sheriff is an officer of very great antiquity." 1 William Blackstone, *Commentaries On The Laws Of England* 339 (George Sharswood ed. 1904); *see also* William Greenwood, *The Authority, Jurisdiction And Method Of Keeping County-Courts, Courts-Leet And Courts-Baron* 2 (8th ed. 1722); Michael Dalton, *The Office And Authoritie Of Sherifs* folios 2-3 (photo. reprint 1985) (1623).[6] As "one of the oldest offices known to the common law system of jurisprudence," 1 Walter H. Anderson, *A Treatise On The Law Of Sheriffs, Coroners And Constables* § 1, at 2 (1941), the office of the sheriff was among those English institutions which the American colonists adopted in settling this country. *See* C.R. Wigan & Dougall Meston, *Mather On Sheriff And Execution Law* 15 (3d ed. 1935).

Thus, in this country, the office of the sheriff was well established at the time of § 1983's enactment. *See, e.g.*, Cong. Globe at 795 (Statement of Rep. Burchard); 2 *Bouvier's Law Dictionary* 518 (1868); John G. Crocker,

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[6] The origin of the office is generally attributed to Alfred the Great (848-900 A.D.), who divided England into shires or counties. Greenwood, *The Authority, Jurisdiction And Method Of Keeping County-Courts* at 2; Dalton, *The Office And Authoritie Of Sherifs* at folio 2. Sir Edward Coke, however, attributed the office to the Romans. 1 Edward Coke, *Institutes Of The Laws Of England* § 248, at 168a (1st Am. ed. 1853).

The Duties Of Sheriffs, Coroners And Constables § 1, at 1 note a (2d ed. 1871) (compiling state laws regarding the election, qualification and entering upon duty of sheriffs). It was likewise common parlance to describe the sheriff as "a conservator of the peace within his county," Crocker, *The Duties Of Sheriffs* § 25, at 18, or as "the chief executive officer of the county." Charles W. Hartshorn, *The New England Sheriff* 13 (2d ed. 1855).[7]

Sheriffs were thus required to carry out the very obligation which the Sherman Amendment would have imposed on local governments. *See* Crocker, *The Duties Of Sheriffs* § 25, at 18; Perley, *The Maine Civil Officer* at 51-53; James Ewing, *A Treatise On The Office And Duty Of A Justice Of The Peace, Sheriff, Coroner, Constable, And Of Executors, Administrators, And Guardians* 538 (3d ed. 1839); Hartshorn, *The New England Sheriff* at 239-42; *The Conductor Generalis* at 377. Moreover, in performing the duty to preserve the peace, the sheriff was authorized by both statutory and common law to invoke the *posse comitatus*, that is, to require the adult citizens of the county to assist in the suppression of riots and the apprehension of criminals. 1 Anderson, *A Treatise On The Law Of Sheriffs* § 141, at 137-39, § 143, at 139; Charles R. Morrison, *Justice And Sheriff* 430 (1872); *The Conductor Generalis* at 377; Perley, *The Maine Civil Officer* at 52-53; Hartshorn, *The New England Sheriff* at 239-42; Blackstone, *Commentaries On The Laws Of England* at 343.

Notwithstanding the duties and extraordinary powers of the sheriff's office, the members of the Forty-Second Congress rejected the Sherman Amendment on the

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[7] *See also* 2 *Bouvier's Law Dictionary* at 518; Edward R. Olcott & Henry M. Spofford, *The Louisiana Magistrate, And Parish Officer's Guide* 208 (1848); Jeremiah Perley, *The Maine Civil Officer* iii-iv (1825); *The Conductor Generalis: Or, The Office, Duty And Authority of Justices Of The Peace, High-Sheriffs, Under-Sheriffs, Coroners, Constables, Gaolers, Jury-Men, And Overseers Of The Poor* 377 (1801).

ground that it imposed on local governments the obligation to keep the peace when they had no such authority under state law. The only plausible explanation for this is that, at least when enforcing state law, the sheriff exercised the authority of the sovereign itself and not the county. This was, and remains, the common understanding of the source of the sheriff's authority. *See* 1 Anderson, *A Treatise On The Law Of Sheriffs* § 6, at 5 ("In the exercise of executive and administrative functions, in conserving the public peace, in vindicating the law, and in preserving the rights of the government, he (the sheriff) represents the sovereignty of the State."); Cooley, *Handbook Of The Law Of Municipal Corporations* § 170, at 512 ("Sheriffs . . . and other so-called county officers are properly state officers for the county. Their functions and duties pertain chiefly to the affairs of state in the county[.]"); 2 *Bouvier's Law Dictionary* at 518 (defining sheriff as "[a] county officer representing the executive or administrative power of the state within his county").[8]

Sheriffs were commonly constitutional officers of the State, *see, e.g.*, Crocker, *The Duties Of Sheriffs* § 1, at

[8] The understanding in this country that sheriffs exercise state authority is simply a continuation of the common law understanding. As a leading authority states, "the Sherife though he be still called Vicecomes [vice-earl], yet all he doth, and all his authoritie is immediately from and under the king, and not from or under the Earle." Dalton, *The Office And Authoritie Of Sherifs* at Fol. 2. As Dalton explained, "the high Sherife (Vicecomes) is an officer of great antiquitie, and of great trust and authoritie, having from the king the custodie, keeping, and command, of the whole Countie committed to his charge and care." *Id.* at Fol. 3. *See also* Greenwood, *The Authority, Jurisdiction And Method Of Keeping County-Courts* at 2.

Blackstone likewise described the sheriff as "do[ing] all the king's business in the county," 1 Blackstone, *Commentaries On The Laws Of England* at 339, and noted that "[a]s the keeper of the king's peace," the sheriff "may apprehend, and commit to prison, all persons who break the peace . . . and may bind any one in recognizance to keep the king's peace" and is "to defend his county against any of the king's enemies." *Id.* at 343 (footnote omitted).

1 & n.1; La. Const. art. 83 (1845) (reproduced in Olcott & Spofford, *The Louisiana Magistrate* at 310); *Hartshorn, The New England Sheriff* at 14; Ewing, *Office And Duty* at 513; Perley, *The Maine Civil Officer* § 1, at 2, and remain so in several States today. *See, e.g.*, Ala. Const. art. V, § 112; La. Const. art. V, § 27; Md. Const. art. IV, § 44. Before entering upon the duties of the office, the sheriff was commonly required to enter into a surety bond with the State "for the faithful execution of [the] office." Ewing, *Office And Duty* at 514; *see also* 2 Anderson, *A Treatise On The Law Of Sheriffs* at 709; Crocker, *The Duties of Sheriffs* at 503; Hartshorn, *The New England Sheriff* at 15; Perley, *The Maine Civil Officer* at 3. Sheriffs were also commonly subject to removal from office through either the State's impeachment procedure or removal by the governor, or both. *See* Crocker, *The Duties Of Sheriffs* § 10, at 8-9; Hartshorn, *The New England Sheriff* at 7; La. Const. art. 88 (1845) (reproduced in Olcott & Spofford, *The Louisiana Magistrate* at 311); Perley, *The Maine Civil Officer* at 7; Ala. Const. art. VII, §§ 173-74; 2 *Bouvier's Law Dictionary* at 518.[9]

As the foregoing demonstrates, sheriffs traditionally have been viewed as being state officers who exercise the State's sovereign authority. This was likewise the understanding of the Forty-Second Congress. It is still the case with respect to Alabama, which has made its sheriffs constitutional officers of the State's executive department, *see* Ala. Const. art. V, § 112, who are required to investigate violations of law "whenever directed to do so . . . by the attorney general or governor," Ala. Code § 36-22-5,

[9] That sheriffs are frequently termed "county officers" does not alter the source of the authority they exercise. As one of the authorities cited by petitioners notes, "[a]s a general rule, the sheriff answers to the attorney general for his activities even though the constitutions and statutes list him as a county officer with his compensation provided by the governing body in the particular county." George T. Felkenes, *The Criminal Justice System: Its Functions And Personnel* 55 (1973).

and must submit written reports "under oath . . . on any subject, relating to the duties of their . . . offices," when required by the Governor. Ala. Const., art. V, § 121.

Moreover, under the Alabama Constitution, sheriffs are subject to impeachment for the same offenses (including the willful neglect of their duties) as are other state officials such as the Governor and Attorney General. *See id.* § 112; art. VII, §§ 173-74. Consistent with the view that Alabama sheriffs exercise state authority, the Governor has the authority to initiate an impeachment proceeding against the sheriff which is prosecuted by the Attorney General and heard by the state Supreme Court. *Parker v. Amerson*, 519 So.2d 442, 444 (Ala. 1987). Alabama's sheriffs thus are at all times accountable to state authority. This stands in stark contrast to the procedure used for the removal of county officers such as members of the board of commissioners and other local officials, which provides for a jury trial in various "court[s] of the county in which such officers hold their office," Ala. Const. art. VII, § 175, and effectively vests removal authority in the local populace.

None of the factors which petitioners and their *amici* rely upon to argue that the sheriff exercises county authority, e.g., the method of selection, funding or jurisdiction of the office, alters the fact that Alabama's sheriffs are constitutional officers of the State who, in enforcing state law, exercise state authority. Contrary to the assertions of petitioners and their *amici* that because sheriffs are elected by the residents of a county they exercise county authority, *see* Pet. Br. 20-21; Br. *Am. Cur.* Lawyers' Committee 16-17, the selection of the sheriff through popular elections does not alter the nature of the office's authority. At the time of § 1983's enactment, it was "the usual practice . . . for the people of the several counties to elect sheriffs at regular intervals." 2 *Bouvier's Law Dictionary* at 518. *See also* Crocker, *The Duty Of Sheriffs* § 1, at 1; Ewing, *Office And Duty* at 513; Olcott & Spofford, *The Louisiana Magistrate* at 208; *see*

also Cong. Globe at 795 (Rep. Burchard). But as the members of the Forty-Second Congress recognized, sheriffs did not exercise the authority of their counties but rather that of their States. At most, the popular election of sheriffs might establish an element of a claim of *respondeat superior* liability (which is not cognizable under § 1983, *see Monell*, 436 U.S. at 694). But it certainly does not establish that a sheriff exercises county authority and makes county policy.

In any event, petitioners' (and their *amici*'s) contention that sheriffs exercise county authority because they are elected by the county's voters is refuted by the provisions of the Alabama Constitution which make sheriffs officers of the State's executive department who remain accountable to the Governor and Attorney General through the mechanism of impeachment. *See* Ala. Const. art. V, § 112; art. VII, §§ 173-74. While petitioners and the United States ignore the existence of the various provisions of Alabama law which place sheriffs in the State's executive department and hold them accountable to the State through the mechanism of impeachment, these provisions of Alabama law compellingly demonstrate that sheriffs are state officers who exercise the authority of the State itself and not the County.[10]

Petitioners and their *amici* also place much stock in provisions of Alabama law which require that counties pay the salary and expenses of the sheriff. *See* Pet. Br.

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[10] Impeachment proceedings have been invoked on numerous occasions. There are five reported instances in which the State has sought to impeach sheriffs. *See State v. McPeters*, 56 So.2d 102 (Ala. 1951); *State v. Baggett*, 41 So.2d 584 (Ala. 1949); *State v. Jinwright*, 55 So. 541 (Ala. 1911); *State v. Latham*, 61 So. 351 (Ala. 1910); *State v. Cazalas*, 50 So. 296 (Ala. 1909). These decisions by no means represent the total number of impeachment proceedings because the Alabama Supreme Court stopped issuing opinions in these cases more than forty years ago. *See McPeters*, 56 So.2d at 103-04. Nor do they account for those instances in which sheriffs have resigned their offices when threatened with impeachment proceedings.

12-13, 15, 17; Br. *Am. Cur.* United States 13-15. But it hardly follows, as the United States argues, that for these reasons "the county government is properly viewed as having authority in regard to county law enforcement activities for purposes of Section 1983." Br. *Am. Cur.* U.S. 9; *see also* Pet. Br. 15 ("county officials other than the sheriff do have law enforcement responsibilities in the sense that the county actually pays for the office, the operating expenses, and the salary of the sheriff"). Not only does this argument erroneously equate the County's funding obligations with a grant of authority, it ignores their ministerial nature.[11]

It likewise proves too much because the States, including Alabama, have long vested in their sheriffs numerous

[11] Certainly history suggests that the source of the office's funding is not probative of the source of the sheriff's authority. As a leading treatise notes, "At ancient common law, the sheriff . . . [was] not entitled to any compensation whatever . . . ." 2 Anderson, *A Treatise On The Law Of Sheriffs* § 706, at 673; *see also* George Atkinson, *A Treatise On The Offices Of High Sheriff, Undersheriff, Bailiff* 267 (6th ed. 1878). Indeed, "[i]t is well known that in the Tudor or Stuart period [1485-1714] the king had the sheriff's services at practically no cost to himself." William A. Morris, *The Medieval English Sheriff To 1300* 283 (reprint 1968) (1927). In the absence of funding from the sovereign itself, sheriffs and their offices were supported by the residents of the county through "the *ferm* [rents] of the shire," *id.* at 282-83, and through the collection of fees, both legal and illegal, for their services. *Id.* Thus, "[t]he burden was in various ways shifted to the men of the vills and hundreds." *Id.* at 283-84.

Notwithstanding that the sheriff's office was funded by residents of the county, the sheriff clearly exercised the authority of the King. *See* 1 Blackstone, *Commentaries On The Laws Of England* at 339, 343-44; Greenwood, *The Authority, Jurisdiction and Method of Keeping County-Courts, Courts-Leet and Courts-Baron* at 2; Dalton, *The Office And Authoritie of Sherifs* at Folios 1-3. While with the decline of the feudal system, the sheriffs were increasingly supported by fees paid for by various sources for the numerous services they performed, *see* Ewing, *Office And Duty* at 542-44; Morrison, *Justice And Sheriff* at 371; Perley, *The Maine Civil Officer* at 69-74, these fees likewise did not alter the settled understanding that the sheriff exercised the sovereign's authority.

duties, many of which unquestionably involve the exercise of state authority. As one leading treatise explains:

> [I]t is his duty, when required, to execute all criminal process, judgments and orders of every court or officer having criminal jurisdiction in this state. . . . He is also required to serve the subpoenas of district attorneys of other counties, upon witnesses in his own county . . . .
>
> In civil matters, the sheriff is the immediate officer of every court of record in the state . . . to whom all writs and process are regularly directed, and he is bound to execute the same. He is to serve the writ or order for arrest, and take bail, summon the jury, and through him the court enforces obedience to its orders and punishes for contempts; and when a cause is determined, he sees that the judgment of the court is carried into effect. He may hold courts to execute writs of inquiry, and such special writs as may be directed to him, pursuant to any statute, and to inquire into any claim of property seized or levied on by him . . . .

Crocker, *The Duties Of Sheriffs* §§ 25-26, at 18-19; *see also* Olcott & Spofford, *The Louisiana Magistrate* at 215-51; Hartshorn, *The New England Sheriff* at 18-24, 36-277; Ewing, *Office and Duty*, at 519-42; Perley, *The Maine Civil Officer* at 25-68.

In Alabama, the sheriff's duties are equally broad in scope. Thus, in addition to "ferret[ing] out crime," Ala. Code § 36-22-3(4), the sheriff must "execute and return the process and orders of the courts of record of th[e] state and of officers of competent authority . . . ." *Id.* § 36-22-3(1). The sheriff is also required to attend the various courts "held in [the] county" and "obey the lawful orders and directions of such courts." *Id.* § 36-22-3(2). If petitioners and their *amici* are correct in their assertions that the county's funding of the office of the sheriff establishes that the county has law enforcement authority, then it likewise establishes that the county

exercises authority with respect to the execution and return of the process issued by the State's courts, its agencies and officials, or in the carrying out of other judicial orders.

But it can hardly be the case that a sheriff makes county policy when he unconstitutionally serves a complaint or writ of attachment in a civil matter between two private parties. Nor can it be the case that a sheriff makes county policy when he unconstitutionally enforces a subpoena issued by a state agency or legislature. The county, being an artificial person with only those powers granted to it by the State, *Fertilizing Co.*, 97 U.S. at 666-67; *Railroad Co.*, 79 U.S. (12 Wall.) at 81; Dillon, *The Law Of Municipal Corporations* § 9, at 29, has no authority over such matters, *see* Ala. Code § 11-3-11, and cannot reasonably be viewed as having any policy with respect thereof. Likewise, under Alabama law, law enforcement is simply not the county's business. That the court of appeals did not "identif[y] any official or body *outside* the county 'that has the responsibility for making law or setting policy' " in the area of law enforcement, see Br. *Am. Cur.* Lawyers' Comm. 14, or that it "never identified whose policy it is" that the sheriff makes, *see* Pet. Br. 17, is easily explained. Under Alabama law, sheriffs are constitutional officers of the State. That the State assigns them a jurisdictional boundary on the basis of county lines as a matter of tradition and administrative convenience is of no relevance in determining whether the corporate entity of the county exercises law enforcement authority.[12]

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[12] Petitioners and their *amicus*, Lawyers' Committee, also point to the existence of the Alabama Highway Patrol to argue that "where the sheriff has full law enforcement authority within the county and the statewide law enforcement responsibility belongs to the state police, it is totally wrong to suggest that the sheriff sets policy for the state." Pet. Br. 19; *see also* Br. *Am. Cur.* Lawyers' Comm. 7-8 (arguing that "Alabama law itself clearly differentiates between state law enforcement authority, which is exercised by the State Highway Patrol through its state troopers, and county law enforcement authority, which is conducted by county sheriffs").

The suggestion that the existence of the state police renders the sheriff a county policymaker (who exercises county authority) is, however, a non sequitur and is refuted by more than one thousand years of understanding that the sheriff, as conservator of the peace, exercises the sovereign's authority. *See supra* pp. 18-21 & n.6. Consistent with this understanding, Alabama has made its sheriffs constitutional officers of the State's executive department subject to impeachment at the initiation of the Governor and Attorney General.

The comparatively recent creation of state police forces (a post World War I development) does not alter this understanding. That the advent of the automobile and its attendant problems, i.e., traffic safety and theft, and the ease with which criminals could cross jurisdictional boundaries, *see* John A. Humphrey & Michael E. Milakovich, *The Administration Of Justice: Law Enforcement, Courts, and Corrections* 42 (1981), led States such as Alabama to establish state police forces, does not alter the source of the sheriff's authority. The States are not prohibited from vesting their sovereign authority in more than one institution of state government.

There is likewise no merit to petitioners' and their *amici*'s contention that Alabama's sheriffs make county policy because "their decisions are final and unreviewable within their counties . . . ." Pet. Br. 13; *see also id.* 18; Br. *Am. Cur.* United States 17-18 (criticizing *Thompson v. Duke*, 882 F.2d 1180 (7th Cir. 1989), *cert. denied*, 495 U.S. 929 (1990)). That Chambers County's board of commissioners or its other officials do not have the authority to review the decisions of the sheriff does not prove that the latter makes county policy. To the contrary, the absence of such authority is entirely consistent with the State's related decisions not to grant counties law enforcement authority and to make sheriffs constitutional officers of the State's executive department. Sheriffs could hardly vindicate the State's sovereign interests if their activities were subject to review by local officials.

It is simply erroneous to suggest, as *amici* Lawyers' Committee does, that Chambers County must be responsible because the court of appeals "identifie[d] no state executive official with any responsibility for supervising

or disciplining" the sheriff. *See* Br. *Am. Cur.* 14. As explained above, the Alabama Constitution gives the Governor and Attorney General the power to supervise and discipline errant sheriffs through the authority to institute impeachment proceedings and require sworn written reports on their activities. *See supra* pp. 21-22. Likewise, the Alabama Constitution vests "[t]he supreme executive power of th[e] state" in the Governor, Ala. Const. art. V, § 113, and necessarily grants the Governor authority over subordinate officers such as sheriffs. *See id.* § 112. Even if it is the unlikely case that a sheriff, as a subordinate officer, could fail to obey the Governor's lawful orders without being impeached for the willful neglect of duty, *see id.* art. VII, §§ 173-74, this alone does not render the sheriff a non-member of the State's executive department. There is nothing unusual about a government structuring its executive branch in a manner that limits the chief executive's authority to control or supervise subordinate or inferior officers. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 685-93 (1988); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

Finally, petitioners' suggestion that "if states could insulate their counties from liability simply by labeling sheriffs and others who operate on the local level as 'state officials,' § 1983 would easily be thwarted," Pet. Br. 13, is mistaken for several reasons. First, as discussed above, Alabama has done far more than label its sheriffs as state officials. Rather, it has made them accountable to the State by subjecting them to an impeachment procedure initiated by the Governor and Attorney General and adjudicated by the state Supreme Court.

Second, Alabama has not made its sheriffs state officials in order to insulate counties from § 1983 liability. As the Alabama Supreme Court's opinion in *Parker* explains, the State's constitutional provisions which made sheriffs executive officers of the State and subjected them to impeachment were enacted in 1901, sixty years before this Court revived § 1983 in *Monroe* and nearly eighty

years before *Monell* overruled *Monroe* with respect to the suability of local governments as "persons" under the statute. *See* 519 So.2d at 443-44.

Third, affirmance of the court of appeals' decision does not "derail" the intent of the Forty-Second Congress or "thwart" the purpose of § 1983. *See* Pet. Br. 13. To the contrary, as explained above, the Forty-Second Congress specifically rejected the imposition of liability on local governments where the States had not granted them authority to act. *See supra* pp. 10-14. Likewise, the Forty-Second Congress specifically rejected the imposition of liability on the States themselves. *See Will*, 491 U.S. at 71. And consistent with these principles, it likewise rejected the imposition of Sherman Amendment liability on county governments notwithstanding the existence of the sheriff's office because it recognized that in enforcing state law, sheriffs exercised state and not county authority. *See supra* pp. 10-14. Petitioners' true objection then is not with the court of appeals for "never identif[ying] whose policy it is" that the sheriff makes. *See* Pet. Br. 17. Rather, it is with the Forty-Second Congress for failing to subject the States themselves to suit.

Fourth, as a leading authority has noted, "states do not order their affairs with future federal litigation in mind, but with a practical appreciation for what seems workable and appropriate." Charles F. Abernathy, *Civil Rights And Constitutional Litigation* 349 (2d ed. 1992). On the other hand, States limit the revenue raising authority of local governments in accordance with the other powers which they have granted them. 4 Chester J. Antieau & John M. Antieau, *Antieau's Local Government Law* §§ 41.00, 41.02, 41.05 (1993); 4 C. Dallas Sands *et al.*, *Local Government Law* § 23.02 (1993). Indeed, "even a broad grant of home-rule powers does not convey . . . autonomy with respect to taxation." 4 Sands, *Local Government Law* § 23.02; *cf.* Advisory Commission On Intergovernmental Relations, *State Constitutional and Statutory Restrictions upon the Structural, Functional, and*

Personnel Powers of Local Government 34 (1962). County governments likewise have only limited power to go into debt. 4 *Antieau's Local Government Law* § 42.00. Imposing the damage award on respondent which petitioners seek—a $1 million award, where, in the fiscal year ending September 30, 1993, the County had total revenues of only $6 million, *see* State of Alabama, Department of Examiners of Public Accounts, *Financial Statement: All Counties* 24 (1994)—would have grave consequences for the County and its ability to provide the services required by law. It was this very type of situation which led the Forty-Second Congress to reject the expansive notion of liability which petitioners ask this Court to impose.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* Counsel of Record for the
Amici Curiae

September 30, 1994

No. 93-1636

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

TOM SWINT, *et al.*,
Petitioners,

v.

CHAMBERS COUNTY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

ROBERT B. MCDUFF*
771 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

CARLOS A. WILLIAMS
Post Office Box 306
Mobile, Alabama 36601
(205) 434-2478

BRYAN STEVENSON
BERNARD HARCOURT
114 North Hull Street
Montgomery, Alabama 36104
(205) 269-1803

Counsel for Petitioners
**Counsel of Record*

29 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Constitutional and Statutory Provisions

Other Materials

No. 93-1636

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SUPPLEMENTAL BRIEF FOR PETITIONERS

This supplemental brief is filed in response to the October 31, 1994 order of this Court instructing the parties to address the following issue:

> Whether the Eleventh Circuit, by virtue of its jurisdiction to review the District Court's denial of the individual defendants' motions seeking summary judgment on the basis of qualified immunity, also had jurisdiction to review the District Court's denial of the Chambers County Commission's motion for summary judgment.

STATEMENT OF THE CASE

In the District Court, several defendants moved for summary judgment and, for the most part, the motions were denied. One of the motions came from the Chambers County Commission, contending there was no county liability because the Sheriff of Chambers County was not a final county policymaker. The district court denied the motion, holding that the sheriff "may have been the final policy maker for the County," pet. app. 67a; *Swint v. City of Wadley, Alabama*, No. 91V-965-E (M.D. Ala. June 2, 1992), but added in a subsequent opinion that it would revisit the issue prior to trial. Pet. App. 72a; *Swint v. City of Wadley, Alabama*, No. 91V-965-E (M.D. Ala. June 26, 1992).

All of the individual defendants appealed the denials of summary judgment, raising qualified immunity issues pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985). At the same time, the Chambers County Commission appealed the denial of summary judgment on the county liability issue, arguing that the denial met the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and arguing alternatively that the Court of Appeals could consider the issue under its discretionary pendent appellate jurisdiction. *Swint v. City of Wadley, Alabama*, No. 92-6574 (11th Cir.), Brief of Appellant Chambers County Commission at 25-27. In response, the plaintiffs, who were appellees in the Court of Appeals and are petitioners in this Court, noted that Eleventh Circuit precedent permitted the Court of Appeals to decide the issue through discretionary pendent appellate jurisdiction. The plaintiffs added that, in light of the qualified immunity appeals, judicial economy might best be served by appellate resolution of the question of county liability, along with the qualified immunity issues, prior to trial. *Swint v. City of Wadley, Alabama*, No. 92-6574 (11th Cir.), Brief of Appellees at 27, citing, *Stewart v.*

Baldwin County Board of Education, 908 F.2d 1499, 1509 (11th Cir. 1990).[1]

In addressing the jurisdictional issue, the Court of Appeals first held that the denial of summary judgment on the county liability question was not a "collateral order" under *Cohen*. Pet. App. 29a-30a; *Swint v. City of Wadley, Alabama*, 5 F.3d 1435, 1449 (11th Cir. 1993). However, the Court also held that it could review the issue through discretionary pendent appellate jurisdiction, citing a number of Eleventh Circuit precedents regarding the availability of pendent review and quoting 9 Moore's Federal Practice 110.25: "[O]nce a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done." Pet. App. 30a; 5 F.3d at 1449. The Court of Appeals then concluded that it would be appropriate to excercise this discretionary jurisdiction to decide the county liability issue in the present case:

> For reasons of judicial economy, we choose to exercise our pendent jurisdiction in this instance . . . . If the County Commission is correct about the merits in its appeal, reviewing the district court's order would put an end to the entire case against the County, because there are no pendent state law claims against it.

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[1] As with the present case, the existing Eleventh Circuit precedent involved cases where discretionary pendent appellate jurisdiction was exercised to review the claims of parties in the case other than the parties whose claims were based on qualified immunity. *Schmelz v. Monroe County*, 954 F.2d 1540, 1541-1544 (11th Cir. 1992) (court reviews cross-appeal of plaintiff in addition to qualified immunity claims of defendants); *Stewart*, 908 F.2d at 1502, 1507-1508 (court reviews Eleventh Amendment claims of school board and school board members in their official capacities in addition to qualified immunity claims of school board members in their individual capacities).

Pet. App. 31a; 5 F.3d at 1449-1450.

The Court of Appeals went on to hold there is no county liability for the actions of the sheriff. Pet. App. 31a-34a; 5 F.3d at 1450-1451. At the same time, the court declined to exercise its discretionary jurisdiction over an appeal by the defendant City of Wadley -- which had raised an issue similar to that raised by the Chambers County Commission -- because the court said "the state of the record" was insufficient to decide the question of city liability for the actions of its police chief. Pet. App. 37a; 5 F.3d at 1452.

In the petition for writ of certiorari seeking review of the Eleventh Circuit's decision on county liability, and in the briefs on the merits, the petitioners have not raised the issue of the jurisdiction of the Court of Appeals. This is for reasons both legal and practical. As a legal matter, the petitioners believe the Court of Appeals did have the jurisdiction and the discretion to decide this issue. The reasons for this are set out in the argument portion of this brief.

As a practical matter, given the existence of a pretrial appeal on qualified immunity matters, the petitioners prefer for the county liability issue to be decided prior to trial, thereby saving time that otherwise would be expended in a subsequent appeal resolving the issue after an initial trial. Indeed, this is a case where both parties and the Court of Appeals agreed that judicial economy would be served by pretrial appellate resolution of the matter. In addition, now that the Eleventh Circuit, following its own precedent, has exercised its discretionary jurisdiction to address the merits, and in doing so has ruled against the petitioners on the merits, a reversal on the jurisdictional issue may well be of little practical benefit to the petitioners. The District Court already has stated it will revisit the county liability issue prior

to trial, and it will be hard-pressed to ignore an Eleventh Circuit decision holding there is no liability, even if that decision has been vacated for jurisdictional reasons. Similarly, upon any subsequent appeal, another Eleventh Circuit panel may well be disinclined to contradict the prior substantive holding of this panel, again even though the holding has been set aside on jurisdictional grounds. Thus, as a practical matter, the petitioners are likely to find themselves one or two years down the road in the same position they are in now, with no progress made on the resolution of the issue of county liability. Accordingly, they would prefer the issue be decided now.

The remainder of this brief will discuss the reasons for the petitioners' position that the Eleventh Circuit did have the jurisdiction and discretion to decide the issue of county liability.

ARGUMENT

I. ALTHOUGH NOT ALWAYS CONSISTENT, THIS COURT'S DECISIONS GENERALLY HAVE UPHELD THE EXERCISE OF DISCRETIONARY PENDENT APPELLATE REVIEW.

28 U.S.C. § 1291 provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." However, this Court has not limited the interpretation of the term "final decisions" to final judgments or other decisions ending litigation in the district courts, but instead has broadened the term to include a class of decisions "which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate

consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546. This Court has held that claims of qualified immunity in cases under 42 U.S.C. § 1983 fit within this class of collateral orders and has permitted appeals under § 1291 from denials of summary judgment motions made by defendants raising qualified immunity. *Mitchell v. Forsyth*, 472 U.S. at 524-530. It is such an appeal by individual defendants that gave the Court of Appeals the initial jurisdiction to review the present case, and the court then proceeded also to consider the otherwise nonappealable issue raised by the Chambers County Commission.

In only a few instances have this Court's decisions touched on the issue of discretionary pendent appellate jurisdiction. Most of those decisions have upheld the exercise of pendent appellate review in the context of § 1291, although the decisions have not been totally consistent.

Perhaps the case most squarely on point is *Chicago R.I. & P.R. Co. v. Stude*, 346 U.S. 574 (1954). It actually involved two consolidated cases with the same parties, one case filed in Federal District Court and the other filed in state court and removed to the same Federal District Court. The Federal District Court granted a motion to dismiss the claim originally filed in federal court and denied a motion to remand the other claim to state court. The plaintiff in the original federal claim then filed an appeal from the dismissal order and the opposing party filed an appeal from the denial of the motion to remand the other claim to state court. The Court of Appeals assumed jurisdiction over both appeals, affirming the District Court's dismissal of the federal complaint and reversing the District Court's denial of the remand.

Certiorari was granted and, in reviewing the issue of

appellate jurisdiction, this Court held that the order dismissing the complaint in the original federal action was an appealable order. Although the Court did not say so, it is clear that the only rationale for that conclusion was that the dismissal was a "final decision" under § 1291. *Id.* at 577-578. This Court then held that the Court of Appeals had jurisdiction to consider not only the appealable final decision, but also the nonappealable denial of the motion to remand:

> [T]he cross-error, challenging the order denying the motion to remand, may be considered as assigned in a case involving an appealable order, the order dismissing the complaint and the action. This is true despite the fact that the order denying the motion to remand standing alone would not be appealable. *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 [(1940)].

346 U.S. at 578. *Stude*, then, stands for the proposition that a Court of Appeals, reviewing an appealable claim by a party under § 1291, also has the discretionary power to review an otherwise nonappealable claim raised by another party in the same case.

Deckert v. Independence Shares Corp., cited by *Stude*, also held that the Court of Appeals had jurisdiction to review an otherwise nonappealable ruling -- specifically, an order denying motions to dismiss filed by a number of parties -- because of the appeal of an order in the same case that granted an injunction against one party and therefore was appealable by that party as a result of the predecessor to 28 U.S.C. § 1292(a)(1). After discussing the statutory power to review the appeal from the injunction, the Court's opinion stated:

> [T]his power is not limited to mere consideration of, and action upon, the order appealed from. . . . [T]he Circuit

> Court of Appeals properly examined the interlocutory order denying the motions to dismiss, although generally it could consider such an order only on appeal from a final decision.

311 U.S. at 287.

Subsequent to both *Stude* and *Deckert*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), was decided. It involved a Court of Appeals decision that reversed interlocutory District Court orders allocating 90% of the costs of a class action notice to the defendants and allowing published notice rather than individual notice to a number of class members. *Id.* at 169. In determining the appealability of the orders, this Court specifically addressed whether the order "allocating the cost of notice" was an appealable collateral order under § 1291, but did not address whether the order regarding published notice also was a collateral order. *Id.* at 169. This Court concluded that the 90% cost order was appealable under § 1291, and then said that the appealability of the 90% order also allowed review of the publication notice order because they were both "aspect[s]" of the District Court's effort to permit the case to proceed as a class action. *Id.* at 172. This allowed review of the merits of both issues. *Id.* at 172-179.

Accordingly, *Eisen* confirms that Courts of Appeals reviewing appealable collateral orders under § 1291, such as the 90% cost order, also have discretionary jurisdiction to review other nonappealable orders in the case, such as the publication notice order, particularly where they both relate to the ability of the case to proceed in one sense or another.[2]

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[2] Although *Eisen* did not speak in terms of pendent appellate jurisdiction, its holding regarding the reviewability of the otherwise non-appealable issue of publication notice certainly demonstrated the propriety and validity of the doctrine of pendent appellate jurisdiction. *See*, Note, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 Yale L. J. 511, 518 (1990) ("In *Eisen* . . . , the Court appeared to sanction the extension of collateral order jurisdiction to pendent rulings.")

Three years after *Eisen*, *Abney v. United States*, 431 U.S. 551 (1977) was decided, holding that the denial of a motion to dismiss based upon double jeopardy in a criminal case was an appealable collateral order under § 1291. *Id.* at 662. However, the Court said this appealability did not extend to the denial of a pretrial motion challenging the sufficiency of the indictment. As the Court stated:

> Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence.

Id. at 663.

Although *Abney* held that the nonappealable claim should not be reviewed along with the appealable double jeopardy claim, *Abney* did not purport to overrule this Court's prior decisions in *Eisen*, *Stude*, or *Deckert*. Indeed, *Abney* did not even mention those decisions. At least one commentator has argued that *Abney* should not be read to abolish the notion of pendent appellate jurisdiction in all cases. "Although the Court's opinion [in *Abney*] does not consider the possibility, it should not be read to preclude consideration of noncollateral rulings when special circumstances suggest that this course would be desirable, and that there has been no attempt to abuse the collateral order appeal opportunity." 16 Wright, Miller, & Cooper, *Federal Practice and Procedure*, § 3937, p. 373 n. 5 (1994 Supp.).

Indeed, were it not for the subsequent decision in *Abney*, this Court's decisions in *Stude* and *Eisen* would control this issue, both holding that Courts of Appeals have the discretion under § 1291 to review nonappealable issues raised by parties to the litigation along with those appealable matters that provide the jurisdiction for the appellate court to consider the case in the first place. As explained in Section III of this brief, this view is in keeping with the purposes and language of § 1291, and with the principles governing this Court's interpretation of § 1291 over the years.

Abney can be reconciled with this view and with *Stude* and *Eisen*. The portion of *Abney* quoted above suggests that this Court, in its supervisory power over the Courts of Appeals, was fashioning a prudential rule to govern and prevent the exercise of pendent appellate jurisdiction in criminal cases rather than abolishing the notion of pendent appellate jurisdiction in all cases, civil and criminal. Such a course would naturally follow from this Court's prior expressions of concern about the particular dangers of creating exceptions to the final judgment rule in criminal cases.

> Despite the[] statutory exceptions to, and judicial construction of, the requirement of finality, "the final judgment rule is the dominant rule in federal appellate practice." 6 Moore's Federal Practice (2d Ed. 1953), 113. *Particularly this is true of criminal prosecutions.* . . . [T]he delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law.

DiBella v. United States, 369 U.S. 121, 126 (1962) (emphasis added). This construction of *Abney* also would explain the failure of *Abney* to discuss this Court's prior holdings in the civil cases of *Eisen* and *Stude* to the effect that pendent

appellate jurisdiction is available.

At the same time, however, *Abney* also can be read as a limitation on jurisdiction rather than a prudential decision, particularly given its conclusory statement that the Court of Appeals in that case "had no jurisdiction" to review the sufficiency of the indictment.[3] If that is the case, *Abney* can be reconciled with *Eisen* and *Stude* only if *Abney*'s jurisdictional interpretation is limited to criminal cases. It is certainly possible to do that, particularly given the statement of this Court in *DiBella*, quoted above, that the final judgment rule is more strictly enforced in criminal than in civil cases.

However, if *Abney* is construed to govern both criminal and civil cases, and is construed to prohibit pendent appellate jurisdiction, it is inconsistent with the prior decisions in *Eisen* and *Stude*. For the reasons given in Section III of this brief, the holdings in *Stude* and *Eisen* are much more in keeping with the purposes and interpretation of § 1291 than *Abney*. Accordingly, if *Abney* is to be read in such a fashion, it should be overruled to that extent. *See*, *Swift & Co. v. Wickham*, 382 U.S. 111, 116, 128 (1965) (overruling a prior decision because that decision was in conflict with earlier precedent and was inconsistent with the structure and historical purpose of the relevant statute); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (overruling a prior decision in part because it created a "dissonance of doctrine" in light of an earlier and more persuasive decision).

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[3] This Court's subsequent opinion in *United States v. MacDonald*, 435 U.S. 850, 857 n. 6 (1978) described *Abney* as concluding "that a federal court of appeals is without pendent jurisdiction over otherwise nonappealable claims even though they are joined with a double jeopardy claim over which the appellate court does have interlocutory appellate jurisdiction."

II. MOST OF THE COURTS OF APPEALS HAVE HELD THAT THEY HAVE THE AUTHORITY TO EXCERCISE DISCRETIONARY PENDENT APPELLATE REVIEW.

In the wake of this Court's decisions, most of the Courts of Appeals have concluded that they do have the power to exercise pendent appellate review on a discretionary basis, although there is some division among them. One commentator has stated:

> Despite . . . *Abney*, the propriety of pendent appellate jurisdiction remains an open question. Perhaps *Abney*'s failure to address the conflicting views expressed in *Eisen*, or to consider the main justifications set forth by those circuits that exercise an expanded scope of collateral order review, is responsible for the persisting debate. But for whatever reason, the appellate courts continue to evince widely differing attitudes . . . toward the appropriate bounds of their authority when faced with an interlocutory appeal under *Cohen*.

Note, *The Proper Scope of Pendent Appellate Jurisdiction*, 100 Yale L.J. at 519.

In addition to the Eleventh Circuit, the Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits all have recognized the authority and discretion, in certain circumstances, to consider otherwise nonappealable claims once jurisdiction has been established in a case through a valid interlocutory appeal. *See*, *Natale v. Town of Ridgefield*, 927 F.2d 101, 104 (2nd Cir. 1991) (recognizing authority to hear nonappealable claims of one party along with the appealable claim of another, but declining to exercise it); *McCowan v. Sears, Roebuck & Co.*, 908 F.2d 1099, 1004 (2nd Cir. 1990) (when jurisdiction existed with respect to

claim of one party but not another, court exercised pendent jurisdiction to hear both claims); *O'Bar v. Pinion*, 953 F.2d 74, 79-80 (4th Cir. 1991); *Roberson v. Mullins*, 29 F.3d 132, 136 n.6 (4th Cir. 1994); *Metlin v. Palasta*, 729 F.2d 353, 355 (5th Cir. 1984); *Foster v. Walsh*, 864 F.2d 416, 418 (6th Cir. 1988) (reviewing otherwise nonappealable issue regarding § 1983 claim against government entity along with appealable issue regarding qualified immunity of individual defendants); *Patterson v. Portch*, 853 F.2d 1399, 1403 (recognizing the appellate power to consider a nonappealable issue involving a party to the case along with an appealable issue in which that party is not involved, but declining to exercise that power in the particular case); *Moreno v. Small Business Admin.*, 877 F.2d 715, 176 (8th Cir. 1989); *Walter v. Morton*, 33 F.2d 1240, 1242 (10th Cir. 1994) (acknowledging pendent appellate jurisdiction to hear otherwise nonappealable claim of municipality along with appealable qualified immunity claims of individual defendants, but declining to exercise it); *Primas v. City of Oklahoma City*, 958 F.2d 1506, 1512 (10th Cir. 1992) (reviewing nonappealable claim of a cross-appellant along with the appealable claim of the appellant regarding qualified immunity).

By contrast, the Third Circuit has held that pendent appellate jurisdiction is not available, *Kershner v. Mazurkiewicz*, 670 F.2d 440, 447 (3rd Cir. 1982) (en banc), the First Circuit has yet to decide the the availability of pendent jurisdiction but has created a "self-imposed" rule against its exercise, *Roque-Rodriguez v. Lema Moya*, 926 F.2d 103, 105 n.2 (1st Cir. 1991), the Ninth Circuit has allowed it in a civil case but not in criminal cases, *Marathon Oil Co. v. United States*, 807 F.2d 759, 764 (9th Cir. 1986); *United States v. Yellow Freight System, Inc.*, 637 F.2d 1248, 1251 (9th Cir. 1980), and the District of Columbia Circuit has left the issue open while expressing doubt about the availability of pendent appellate jurisdiction. *Gross v. Winter*,

876 F.2d 165, 168 n.3 (D.C. Cir. 1989).

III. THE PURPOSES OF § 1291, AND THE PRINCIPLES OF INTERPRETATION FOLLOWED BY THIS COURT OVER THE YEARS WITH RESPECT TO § 1291, DEMONSTRATE THAT COURTS OF APPEALS HAVE THE POWER OF DISCRETIONARY PENDENT APPELLATE REVIEW IN CASES THAT ARE APPEALABLE UNDER § 1291.

A. § 1291 Has Been Interpreted By This Court In A Practical And Flexible Manner Rather Than A Literal Manner.

The language of § 1291 speaks in terms of "final decisions." Of course, if taken literally, the term "final decision[]" would mean the *last decision* in a case, whether a final judgment, a denial of a motion to alter or amend, or an order regarding attorneys' fees. But § 1291 has not been interpreted literally. "[A] decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Mitchell v. Forsyth*, 472 U.S. at 524, *quoting*, *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). For the most part, the term "final decision[]" has been interpreted to mean the equivalent of a final judgment. "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988), *quoting*, *Catlin v. United States*, 324 U.S. 229, 233 (1945).

However, limiting appeals only to final judgments would prove unworkable. "Recognition of the shortcomings inherent in a rigid application of the final judgment rule has led to the promulgation of exceptions by both Congress and the courts."

Note, *The Proper Scope of Pendent Appellate Jurisdiction*, 100 Yale L.J. at 513. Congress, through enactment of 28 U.S.C. § 1292(a) and (b) has created avenues of interlocutory appeal for orders relating to injunctions and orders that are deemed sufficiently important by both the District Court and the Court of Appeals to merit interlocutory review through certification. In addition, Rule 54(b) of the Federal Rules of Civil Procedure allows for a District Court to permit an immediate appeal of any order adjudicating a specific claim, or the claims of a specific party, even though other claims or parties remain in the case.

But this has not been enough to cure the potential inefficiency and unfairness of the final judgment rule.

> The provisions [of § 1292 and Rule 54(b)] fall far short of covering the variety of situations in which a rigid adherence to the final judgment rule might produce serious inefficiency or injustice. Section 1292(a) applies only to injunctive relief, while section 1292(b) and rule 54(b) are limited to civil actions involving complex issues or parties and contain restrictive certification procedures. The courts have responded by formulating exceptions of their own to the final judgment rule, the most important of which is the collateral order doctrine.

Id. at 514-515. With the collateral order doctrine, this Court has interpreted the phrase "final decisions" in § 1291 to also include interlocutory orders "which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546. Although *Cohen* is based upon an interpretation of the language of § 1291, it is basically a judge-made exception to

the final judgment rule. *See, Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467-468 (1978) (referring to "the 'collateral order' exception articulated by this Court in *Cohen*").

The flexibility demonstrated by this Court in *Cohen* follows from the principle, adopted and often repeated by this Court, that § 1291 is to be given a "practical rather than a technical construction." *Eisen v. Carlisle & Jacquelin*, 417 U.S. at 171, *quoting*, *Cohen*, 337 U.S. at 546. As this Court has stated with respect to § 1291, "[t]he considerations that determine finality are not abstractions but have reference to very real interests -- not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system." *Budinich v. Becton Dickinson & Co.*, 486 U.S. at 196, *quoting*, *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 69 (1948).

B. The Purpose of § 1291, As Passed By Congress And Interpreted By This Court, Is To Prevent Unnecessary Piecemeal Appeals While At The Same Time Allowing The Smooth Functioning Of The Judicial System, And Discretionary Pendent Appellate Review Promotes That Statutory Purpose.

It is quite obvious that the purpose of § 1291 is to limit appeals so that parties cannot, at will, interrupt the trial court proceedings and impose upon the time of appellate courts in order to obtain appellate review of every adverse trial court decision.

> In § 1291 Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by "piecemeal appellate review of trial court decisions which do not terminate the litigation." *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982).

Richardson-Morrell, Inc. v. Koller, 472 U.S. 424, 430 (1985).

At the same time, this Court's practical construction of the finality concept of § 1291 has focused specifically on the underlying interests behind the statute -- interests that, as this Court has stated, "pertain to the smooth functioning of our judicial system." *Budinich v. Becton Dickinson & Co.*, 486 U.S. at 196, *quoting*, *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. at 69. Thus, in interpreting § 1291, it is appropriate to look not only at the congressional intent of limiting piecemeal appeals, but also at the purpose of promoting the smooth and efficient operation of the judicial system.

Discretionary pendent appellate review under § 1291 promotes those purposes by increasing the efficient functioning of the federal judicial system without increasing piecemeal appellate review. By its very nature, the exercise of discretionary pendent review occurs only when a valid interlocutory appeal already is in place under § 1291. Accordingly, the pendent appellate review does not increase the number of piecemeal interlocutory appeals.

Moreover, it allows appellate courts the discretion to resolve interlocutory issues when the resolution will contribute to the speedy and efficient handling of the overall litigation, as well as the discretion to decline to resolve the issues when that goal will not be served. As the Eleventh Circuit noted, once the case is lawfully before the Court of Appeals, the doctrine of pendent appellate jurisdiction gives the Court the "power to do what plainly ought to be done." *Stewart v. Baldwin County Board of Education*, 908 F.2d at 1509, *quoting*, 9 Moore's Federal Practice 110.25. It also accords the flexibility to avoid unnecessary expenditures of

judicial resources down the road. As Judge Friendly noted in *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1201 (2nd Cir. 1970), when an appellate court already has interlocutory jurisdiction of the case, "it would be absurd to require the court to close its eyes to another interlocutory order which, though not itself appealable, might infect the entire proceeding with error and thus require reversal after a large expenditure of judicial and professional time."

In the present case, once an interlocutory appeal was taken, thereby halting proceedings in the District Court, the parties on both sides of the pendent county liability issue asserted that appellate resolution of the issue would promote judicial economy. After reviewing these contentions, the Court of Appeals agreed, stating that if the defendants' position on the merits of county liability was correct, it "would put an end to the entire case against the County." Pet. App. 31a; 5 F.3d at 1450. This is the sort of situation where the option of discretionary pendent appellate review increases the power of the Court of Appeals to prevent needless delay and expenditure of resources, and to promote the smooth and efficient functioning of the judicial system consistent with the purposes of § 1291.

None of the Courts of Appeals that currently exercise discretionary pendent review seem to have overused it, and it is doubtful that any would. Federal Courts of Appeals are very busy as it is, and there is no reason or inclination for them to reach out for discretionary pendent issues unless the interlocutory resolution of those issues will save time and promote efficiency.

C. Nothing In The Language Of § 1291 Precludes Discretionary Pendent Appellate Review.

The language of § 1291 provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . ." As noted previously, that language has not been interpreted literally. If it had been, "final decisions" would mean the last decision in each case.

Moreover, once jurisdiction has been established, the language has not been interpreted to limit the scope of review to those "final decisions." The majority of "final decisions" appealed under § 1291 are case-ending decisions -- final judgments -- yet it is clear that the scope of appellate review is not confined to the narrow terms of those "final decisions," but instead can include all prior decisions made in the case. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). For example, if a final judgment on a jury verdict awards damages against one defendant and not another, but the second defendant was also required earlier in the case to pay a monetary sanction for a discovery violation, the appeals of the final judgment can include not only the first defendant's challenge to the jury award , but the second defendant's challenge to the prior monetary sanction as well.

Thus, nothing in the language or interpretation of § 1291 requires that a Court of Appeals, having obtained jurisdiction of the case, limit the scope of its appellate review to the specific appealable "final decision" that created the jurisdictional avenue in the first place. Whether that "final decision" is a final judgment or a collateral order, a practical construction of § 1291 would permit the appellate court to exercise authority to review otherwise nonappealable decisions in the case when appropriate.

D. Whether Discretionary Pendent Appellate Review Is Available Under § 1292(a) or (b) Is Not Controlling On The Issue Of Whether It Is Available Under § 1291.

Because the appeal in this case arose under § 1291, this brief has focused on whether discretionary appellate review is available consistent with that statute. This Court need not address whether such review would be available under § 1292(a), which governs appeals relating to injunctions, or § 1292(b), which governs certified appeals.

However, it should be noted that § 1291 seems to present the strongest case for discretionary review, particularly given the practical rather than technical interpretation of § 1291, the non-literal construction of its language, the willingness to create judge-made exceptions to the final judgment rule within § 1291, and the focus on the smooth functioning of the judicial system in the interpretation of the statute. These factors do not seem to play as prominent a role in the interpretation of § 1292(a) or (b), which are more narrowly drawn than § 1291 and were designed by Congress to address more specific situations.[4]

With respect to § 1292(b), this Court held in *United States v. Stanley*, 483 U.S. 669, 676-677 (1987), that the scope of appellate review under that statute is limited to the certified order, while issues arising in other orders may not be considered unless they also are certified. *Stanley* does not

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[4] As noted earlier, this Court's 1940 decision in *Deckert v. United States*, 311 U.S. at 287, involving the predecessor to § 1292(a), held that discretionary pendent review would be available on the appeal of an injunction. It is not necessary for this Court to address that issue further in the context of the present case.

answer the question in the present case, in part for the reasons just mentioned regarding the distinctions between § 1291 and § 1292(b). In addition, the language and structure of § 1292(b) provide that both the District Court and the Court of Appeals play indispensable roles in deciding which orders should be reviewed, and therefore the Court of Appeals cannot, by itself, exercise discretion to expand the scope of review beyond what the District Court certified. This limitation does not exist in connection with § 1291.

CONCLUSION

All of the foregoing points toward a practical construction of § 1291 that permits the Courts of Appeals to save time and promote efficiency by resolving, when appropriate, otherwise nonappealable issues in cases where the Courts already have appellate jurisdiction. For these reasons, and on the basis of the authorities cited, the Court of Appeals in the present case had the authority to resolve the county liability issue as part of the interlocutory appellate review in the case. Accordingly, this Court should also review and resolve the county liability issue on its merits.

Respectfully Submitted,

ROBERT B. McDUFF*
771 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

CARLOS A. WILLIAMS
Post Office Box 306
Mobile, Alabama 36601
(205) 434-2478

BRYAN STEVENSON
BERNARD HARCOURT
114 North Hull Street
Montgomery, Alabama 36104
(205) 269-1803

Counsel for Petitioners
* Counsel of Record

(13)

No. 93-1636

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

TOM SWINT, TONY SPRADLEY, DRUCILLA JAMES and JEROME LEWIS,
Petitioners,
v.
CHAMBERS COUNTY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT CHAMBERS COUNTY COMMISSION

PAUL M. SMITH *
BRUCE J. ENNIS
DONALD B. VERRILLI, JR.
THOMAS J. PERRELLI
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

JAMES W. WEBB
KENDRICK E. WEBB
BART HARMON
WEBB & ELEY, P.C.
166 Commerce Street
Suite 300
Post Office Box 238
Montgomery, Alabama 36101
(205) 262-1850
Counsel for Respondent

* Counsel of Record

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23 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

MISCELLANEOUS

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SUPPLEMENTAL BRIEF FOR RESPONDENT CHAMBERS COUNTY COMMISSION

The United States Court of Appeals for the Eleventh Circuit did not exceed its authority when it chose to exercise "pendent appellate jurisdiction" to review the district court's denial of the County Commission's motion for summary judgment. Legal and practical considerations compel the conclusion that courts of appeals should have discretion to review nonappealable orders that are pendent to appealable "collateral orders," and this was certainly a circumstance where that discretion was properly exercised. The court resolved a purely legal issue that was ripe for review, was closely related to the other issues before the court, and had the potential to resolve *all* of the remaining claims against the County Commission.

Alternatively, the district court's order denying the County Commission's motion for summary judgment was itself an appealable "collateral order." In that motion, respondent argued that this case did not satisfy the prerequisites for municipal liability under section 1983 identified in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), because Sheriff Morgan lacked the legal authority to set actionable "policies" for the County Commission. Consistent with this Court's treatment of the appealability of orders rejecting other analogous defenses in section 1983 actions, respondent submits that the Court should also authorize interlocutory appeals from orders rejecting such legal arguments when presented by municipal defendants in section 1983 litigation.

I. COURTS OF APPEALS SHOULD HAVE THE POWER TO REACH "PENDENT" ISSUES IN COLLATERAL-ORDER APPEALS.

The Eleventh Circuit was faced with simultaneous pretrial appeals by three individual defendants and by two municipal defendants, respondent Chambers County Commission and the City of Wadley. The individual defendants, who included Sheriff Morgan, had the right to appeal from the denial of their motions claiming qualified immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985) (concluding that denial of a qualified-immunity motion is an appealable collateral order). The municipalities were appealing from the denial of motions for summary judgment predicated on the legal argument that the individual defendants were not municipal "policymakers" under *Monell*. The Eleventh Circuit decided that this issue was not independently appealable, Pet. App. 29a-30a, but chose to exercise "pendent appellate jurisdiction" over the County Commission's appeal, *id. at* 30a-31a.[1]

[1] The court of appeals refused to entertain the City's appeal, concluding that the state of the record precluded a final determination whether the Chief of Police in Wadley has, in practice, final policymaking authority. Pet. App. 37a.

The decision to entertain the County Commission's appeal finds ample support in the case law in the Eleventh Circuit[2] and other circuits.[3] This Court, however, has not signalled a consistent approach to the permissible scope of appellate review in the collateral-order context. *Compare Abney v. United States*, 431 U.S. 651, 662-63 (1977) (collateral-order appeal of double jeopardy claim does not provide basis for pretrial review of sufficiency of indictment), *with Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974) (collateral-order appeal of order allocating costs of class-action notice permits consideration of decision to allow notice by publication). *See* Note, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 Yale L.J. 511, 518, 519

[2] *See Menuel v. City of Atlanta*, 25 F.3d 990, 995 n.7 (11th Cir. 1994); *Kelly v. Curtis*, 21 F.3d 1544, 1545 (11th Cir. 1994); *Schmelz v. Monroe County*, 954 F.2d 1540, 1543-44 (11th Cir. 1992); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1509 (11th Cir. 1990).

[3] Although some circuits limit pendent appellate jurisdiction to review of issues that are "inextricably intertwined" with an appealable issue, *see, e.g., Williams v. Commonwealth*, 24 F.3d 1526, 1542-43 (6th Cir.), *cert. denied*, 115 S. Ct. 358 (1994); *Brown v. Grabowski*, 922 F.2d 1097, 1106 n.3 (3d Cir. 1990), *cert. denied*, 501 U.S. 1218 (1991), several others have joined the Eleventh Circuit in holding that they have discretion to reach pendent issues where there is substantial overlap with appealable issues and where a broader ruling will promote the resolution of the case, *see, e.g., San Filippo v. U.S. Trust Co. of New York*, 737 F.2d 246, 255 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985) (reaching the merits in a qualified-immunity appeal, because of the "waste of judicial resources" if suit were to go forward); *Akers v. Caperton*, 998 F.2d 220, 224 (4th Cir., 1993) (resolving constitutional claim because it was "substantially related to the [appealable] immunities issue and its resolution will advance this litigation"); *Robinson v. Volkswagenwerk AG*, 940 F.2d 1369, 1374 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1160 (1992) (setting forth factors guiding exercise of discretion).

(1990) (in *Eisen*, "the Court appeared to sanction the extension of collateral-order jurisdiction to pendent rulings"; in *Abney*, "however, the Court took a markedly different approach"). *See also* 16 C. Wright, A. Miller, E. Cooper, and E. Gressman, *Federal Practice and Procedure* § 3937, at 373 (*Abney* "should not be read to preclude consideration of noncollateral rulings when special circumstances suggest that this course would be desirable, and that there has been no attempt to abuse the collateral order appeal opportunity").[4] As explained more fully below, the Eleventh Circuit's exercise of pendent appellate jurisdiction in this case was fully consistent with this Court's treatment of the scope of appellate jurisdiction in analogous contexts, and also made a great deal of sense.

A. The Power to Exercise Pendent Appellate Jurisdiction Is Well Recognized in a Broad Range of Contexts.

This Court has previously noted that the statutes governing appellate jurisdiction, such as 28 U.S.C. § 1291, are to be construed in light of their "object of efficient administration of justice in the federal courts." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 1996 (1994); *see* 9 J. Moore, *Moore's Federal Practice* § 110 (noting that section 1291 "has been liberally construed"); *cf.* Fed. R. Civ. P. 1 (civil rules "shall be construed and administered to secure the just, speedy,

[4] As petitioners point out, Supp. Br. at 6-7, *Chicago R.I. & P.R. Co. v. Stude*, 346 U.S. 574 (1954), is another relevant precedent. There, one party had appealed the dismissal of its complaint. In a consolidated case that had been removed from state court, the opposing party simultaneously appealed the denial of its motion to remand. Although recognizing that denial of a motion to remand is not independently appealable, *id.* at 578, the Court held that the court of appeals properly reached that issue on the basis of the pending appeal filed in the other case by the opposing party, which apparently was based (like collateral-order appeals) on 28 U.S.C. § 1291, *id.*

and inexpensive determination of every action"). The principal policy concern underlying the "finality" requirement of section 1291 is Congress's desire to avoid "piecemeal litigation." *E.g., Catlin v. United States*, 324 U.S. 229, 233-234 (1945). That concern justifies careful limitations on the categories of orders that may form the basis of interlocutory appeals. *See Digital Equipment Corp., supra.* Where such an appeal has been properly filed, however, the *same* concern argues in *favor* of granting appellate tribunals the power to resolve related issues that might otherwise require a later appeal. Thus, in a broad range of contexts, this Court has consistently held that the courts of appeals have discretion to consider "pendent" legal issues, even if those issues, by themselves, could not have formed an independent basis for appellate jurisdiction.

For example, it is well established that the courts of appeals, when reviewing preliminary injunctions under 28 U.S.C. § 1292(a)(1), are not confined to considering the propriety of the injunctions themselves. To the contrary, "[j]urisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development." 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *supra*, § 3921, at 17. As Judge Friendly put the matter, "when, as here, the district court has granted a temporary injunction so that the court of appeals has unquestioned jurisdiction of the cause, it would be absurd to require the court to close its eyes to another interlocutory order which, though not itself appealable, might infect the entire proceeding with error and thus require reversal after the large expenditure of judicial and professional time." *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1201 (2d Cir. 1970) (reviewing the district court's refusal to stay proceedings).

Thus, this Court has held that it can be appropriate, in an appeal from the grant or refusal of preliminary injunctive relief, for the court of appeals to proceed to decide the case on the merits. *See Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 757 (1986). Although the Court in *Thornburgh* recognized that courts of appeals would ordinarily review only the injunction itself in such cases, the Court made clear that this was "a rule of orderly judicial administration, not a limit on judicial power." *Id.* Where "a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance," the court of appeals may address any issue under its plenary scope of review. *Id. See also Deckert v. Independence Shares Corp.,* 311 U.S. 282, 287 (1940) (approving review of order denying motion to dismiss in connection with appeal from separate order granting preliminary injunction).

The Court has adopted a similarly broad interpretation of the jurisdictional statute at issue here—section 1291—in its usual application involving appeals after final judgment has been entered. In that setting, the Court has authorized appellate consideration of almost any interlocutory order previously entered by the district court, even those that were entirely separate from the merits of the "final decision" that formed the basis of the appeal. *See* 15A C. Wright, A. Miller & E. Cooper, *supra,* § 3905.1, at 250 & n. 3 (citing cases).

Another example is the scope of review available to a court of appeals that has jurisdiction to consider one particular action of a district court on a petition for a writ of mandamus. In such a case, this Court has authorized a court of appeals, in order to avoid "piecemeal litigation," to go on and consider related issues that could not themselves have been brought to the court through mandamus. *Schlagenhauf v. Holder,* 379 U.S. 104, 111 (1964); *see Southern Pacific Transp. Co. v. San Antonio,*

748 F.2d 266, 270 (5th Cir. 1984) (where case came to court on petition for a writ of mandamus challenging a stay of execution of judgment, court of appeals had power to address related issues that "may not independently be grounds for mandamus"). Wright and Miller offer the following explanation of the practical considerations that underlie the *Schlagenhauf* rule:

> [T]he determination that the scope of mandamus review might properly be extended to related questions that would not independently support such review seems entirely appropriate. All of the damage that may be done by mandamus procedure has been realized once the question of power is brought before the court of appeals. If closely related matters can be determined without additional delay, burden on the parties or the courts, or expansion beyond the powers a court of appeals might exercise on other methods of review, they are better determined on the petition.

16 C. Wright, A. Miller, E. Cooper & E. Gressman, *supra,* § 3934, at 232.

Finally, the Court has applied the same practical construction when determining the scope of its own powers of review in cases brought here on writs of certiorari. Although the usual rule is that the Court will not review issues that are not raised in the petition for certiorari, the Court has reserved the power to address any other issue it discerns in the record of the case. *Wood v. Georgia,* 450 U.S. 261, 264 n.5 (1981); *Vance v. Terrazas,* 444 U.S. 252, 258 n.5 (1980) ("consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented [below] is not beyond our power, and in appropriate circumstances we have addressed them"); *see also* S. Ct. Rule 24.1(a) ("At its option, . . . the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.").

Thus, if the Court were to conclude that review, in collateral-order appeals, is categorically limited to the merits of the specific order on appeal, and that courts of appeals lack discretion to consider related issues even where doing so would plainly expedite the orderly resolution of the case, such a rule would stand out as exceptional. For the reasons stated in the next section, we do not believe that such an exceptional rule is justified.

B. The Courts of Appeals Should Have Equivalent Discretion in Collateral-Order Appeals.

In deciding whether Congress intended to allow courts of appeals to exercise pendent appellate jurisdiction in collateral-order cases, it is of course appropriate to begin with the statute itself. Section 1291, however, provides no real guidance, since it does not address the *scope* of review in appeals from "final decisions." The fairest conclusion is that Congress left it up to the courts to determine the appropriate scope of review, where an appeal has been properly filed.[5] The statutory language provides no basis for drawing a distinction, in terms of the scope of review, between collateral-order appeals, on the one hand, and other appeals under section 1291 or injunctive appeals under section 1292(a)(1), on the other.[6] Nor

[5] As a general matter, it should not be assumed that Congress intended a strict construction of the statutes establishing the jurisdiction of the courts of appeals, in view of the fact that it simultaneously granted this Court the power, by rule, to authorize an appeal of any "interlocutory decision . . . that is not otherwise provided for." 28 U.S.C. § 1292(e). Congress has also expressly conferred power on this Court to define the word "final" in section 1291 by rule. *See* 28 U.S.C. § 2072.

[6] Section 1291 grants jurisdiction over "appeals from all final decisions of the district courts," without addressing whether review is limited to the merits of such "final decisions." Section 1292(a)(1) grants jurisdiction over appeals from "interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions," without addressing whether review is limited to such orders.

is there any apparent basis in the statute's language for rejecting the concept of "pendent jurisdiction" in the appellate context, while accepting the same concept in the interpretation of the statutes granting jurisdiction to the federal *district* courts. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).[7]

Because the statute does not preclude pendent appellate jurisdiction in collateral-order appeals, this Court can and should opt in favor of allowing courts of appeals to exercise that power. The "same practical considerations for avoiding piecemeal appeals that underlie the final order doctrine instruct that when an appeal is otherwise warranted on a single issue, we may review all issues that the parties raise and which are reasonably related when that review will advance the litigation or avoid further appeals." *O'Bar v. Pinion*, 953 F.2d 74, 80 (4th Cir. 1991). Just as in the injunctive appeal context, if there is an important but nonappealable issue that is ready for review when a collateral order is appealed, a decision to review that issue can sometimes produce enormous savings in time and judicial resources. *See Schmelz v. Monroe County*, 954 F.2d 1540, 1542-43 (11th Cir. 1992) (citing "concerns for judicial economy"); *San Filippo v. U.S. Trust Co.*, 737 F.2d 246, 255 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985). There would be no justification for requiring the courts of appeals, in this one category of appeals, to stay their hand even when it is apparent that they are remanding a case for lengthy additional proceedings that will be a complete waste of time because of a previous error committed by the district court.

[7] As noted, the Eleventh Circuit in this case treated the appeal of one party, the Chambers County Commission, as "pendent" to the authorized interlocutory appeal of another party, Sheriff Morgan. In this regard, it is noteworthy that Congress, when it codified the rules of pendent jurisdiction for federal district courts, specifically endorsed "pendent party jurisdiction." *See* 28 U.S.C. § 1367(a) ("Such supplemental jurisdiction shall include claims that involve joinder or intervention of additional parties.").

Certainly such a restrictive approach cannot be defended on the theory that allowing pendent appellate jurisdiction in the collateral-order context will do more systemic harm than good. None of the arguments against allowing courts of appeals to have this power retains any force if courts will exercise appropriate *discretion* in deciding whether to exercise pendent jurisdiction in each case.

First, courts of appeals must be sensitive to the same policy concern that has led this Court to limit interlocutory appeals—the need to minimize "piecemeal appeals." *See, e.g., Digital Equipment Corp.*, 114 S. Ct. at 1998. But this concern is not very compelling here, where the issue is whether to broaden the scope of an interlocutory appeal that has *already* been filed. In most instances, if a collateral-order appeal is already being pursued in a case, addressing "pendent" issues will not increase the disruptive effects of the appeal. In any event, where a pendent appeal is likely to add to the disruption caused by a collateral-order appeal, the court of appeals may decide, in its discretion, not to hear or decide the pendent issue.

A more specific concern in this context is the one expressed in *Abney*, *supra*—that a rule allowing pendent appeals "would encourage criminal defendants to seek review of, or assert, frivolous [collateral-order] claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to" trial. 431 U.S. at 663. But, here again, the discretionary nature of pendent appellate jurisdiction alleviates this concern. Courts of appeals should refuse to address any "pendent" issues except in those cases where the appellant has mounted at least a substantial legal challenge to the appealable collateral order that is supplying the court's appellate jurisdiction. Indeed, that is precisely the rule applied when district courts are deciding whether to exercise pendent jurisdiction of state-law claims. *See United Mine Workers*, 383 U.S. at 726-27; *see also* 28

U.S.C. § 1367(c)(2) (allowing district courts to dismiss pendent state claims if "the [state] claim substantially predominates over the claim or claims over which the district court has original jurisdiction").

Finally, any concern that courts of appeals will reach issues prematurely, in the absence of an adequate record, can also be handled through the exercise of appropriate discretion. Just as in the injunctive-appeal context, *see Thornburgh*, 476 U.S. at 757, the courts of appeals should only address pendent issues in collateral-order appeals when there is no potential dispute about the relevant facts. In the absence of such a dispute, they are in as good a position to decide the issue in the current appeal as they would be in a later appeal.

As these arguments suggest, the appropriate use of pendent appellate jurisdiction in the collateral-order context is likely to be relatively rare. The courts of appeals can and should be reticent about deciding issues beyond the merits of the appealable collateral order itself. And experience, in those circuits that have been most receptive to the concept, teaches that the power has not been abused. But the courts of appeals also should not be required to remand a case for trial with the knowledge that the future course of the proceedings will be made much more burdensome, or even entirely pointless, because of an erroneous legal ruling already entered by the district court.

II. AN EXERCISE OF PENDENT APPELLATE JURISDICTION WAS FULLY APPROPRIATE IN THIS CASE.

The case at bar presents an example of the appropriate exercise of pendent appellate jurisdiction. Indeed, in the circumstances of this case, there can be little doubt that the Eleventh Circuit correctly weighed the competing costs and benefits of broadening the scope of its review to include not only the qualified individual immunity of Sheriff Morgan but also municipal liability under *Monell*.

First, the Eleventh Circuit had every reason to believe that addressing the County Commission's potential liability at this stage would be beneficial. Whether the County Commission could be held liable for Sheriff Morgan's conduct was a pure question of law that had already been presented to the district court. *Both* parties supported the court's decision to address this question once the case had been brought to the appellate level. The question was substantially related to the qualified-immunity issue already before the court.[8] Most importantly, in the circumstances of this case, if the County Commission was correct in its arguments, "reviewing the district court's order would put an end to the entire case against the County." Pet. App. 31a. Thus, there was a potential to simplify the remand proceedings substantially, while shielding a governmental body from the rigors of a pointless but complex trial.

There was also no reason to believe that deciding this additional issue would be harmful in any way. There was no danger of disrupting pending district court proceedings, because the trial of the case against the Chambers County Commission clearly was not going to proceed prior to the disposition of the individual defendants' appeal on their qualified immunity claims.[9] Nor was there any basis for

[8] A first step, in any analysis of qualified immunity in the Eleventh Circuit, is a determination whether the defendant " 'was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.' " *Rich v. Dollar*, 841 F.2d 1558, 1563 (11th Cir. 1988) (quoting *Zeigler v. Jackson*, 716 F.2d 847, 849 (11th Cir. 1983)). *See* Pet. App. 10a (noting this element of the test). That determination, of course, is closely related to the question whether the individual defendant has sufficient authority to make "policy" for a given municipality.

[9] It would have made no sense for the district court to convene a trial against the County Commission, without the individual defendants, since the constitutionality of the Sheriff's conduct would have had to be litigated in such a trial. If claims against individuals and municipalities are not going to be tried together, it makes far more sense to try the former first, proceeding to a trial against the municipality only if the jury determines that the individuals acted unconstitutionally. *See, e.g., City of Los Angeles v. Heller*, 475 U.S. 796 (1986).

concern that the qualified-immunity appeals were pretexts for bringing the County Commission's claim to the appellate level. To the contrary, the individual defendants partially *prevailed* in their arguments concerning qualified immunity.[10]

Finally, the Eleventh Circuit was very attentive to the need for an adequate record on which to resolve the pendent issue. It chose to reach the question of the authority of an Alabama sheriff to set policy for a county, precisely because there was an adequate record for resolving that question. But it simultaneously refused to entertain the City of Wadley's appeal, because there was an inadequate record for deciding whether, in "custom and practice," the city's police chief exercised policymaking authority. Pet. App. 37a.

In these circumstances, the Eleventh Circuit's careful exercise of discretion to hear the Chambers County Commission's appeal was perfectly appropriate.

III. IN THE ALTERNATIVE, THE COURT OF APPEALS HAD JURISDICTION UNDER THE COLLATERAL-ORDER DOCTRINE TO DETERMINE WHETHER THE COUNTY COMMISSION COULD BE HELD LIABLE FOR THE ACTIONS OF A STATE OFFICIAL.

This Court has not considered whether denial of a municipality's motion to dismiss a section 1983 claim—for failure to satisfy the *Monell* "policy or custom" standard—is an appealable order under the collateral-order

[10] The Eleventh Circuit ruled that the district court had erred in refusing to find that the individual defendants were immune from claims under the Due Process Clause. Pet. App. 25a-27a. On rehearing, the court held that the district court should also have entered summary judgment for Sheriff Morgan on the equal protection claim. *Id.* at 43a.

rule. The logic of this Court's previous cases, however, suggests that the Court should treat such a denial as an appealable order, at least where, as here, the motion is based entirely on a *legal* argument that a given official lacks the authority to set municipal policy through his actions.

As this Court has noted, the collateral-order doctrine is not an exception to the finality requirement of section 1291, but rather is a "practical construction" of it. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *Digital Equipment Corp.*, 114 S. Ct. at 1995. To fall within the collateral-order doctrine, a district court order must "conclusively determine the disputed question," "resolve an important issue completely separate from the merits of the action," and "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (summarizing *Cohen*). These criteria are all met where, as here, (1) plaintiffs have premised section 1983 claims against a municipality entirely on the proposition that a given official sets municipal policy through his or her actions, and (2) the district court has rejected the municipality's pretrial motion arguing that, as a matter of law, that official lacks the authority to set policy for the municipality.[11]

The key question here involves the application of the third prong of the *Cohen* test—*i.e.*, whether municipalities can claim a substantial interest in avoiding unnecessary trials in cases where *Monell* is not satisfied, and thus have a claim that would be "effectively unreviewable" in the

[11] The situation may be quite different in the much more numerous category of cases where plaintiffs allege that a municipality has adopted an illegal "policy" through a long course of customary conduct, or by ratification of a given employee's actions. In such cases, there are likely to be subsidiary factual issues that need to be resolved and render an interlocutory appeal undesirable. Here, by contrast, the issue appealed was a pure question of law concerning a given official's authority to set municipal policy.

absence of an interlocutory appeal in circumstances like those presented here. In addressing this question, it is noteworthy that the Court has already authorized collateral-order appeals with respect to the other two major legal defenses available under section 1983. Individual defendants sued in their individual capacity may, as in the present case, appeal the denial of a motion to dismiss premised on a claim of good-faith immunity. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985). In addition, any individual or governmental body sued in its official capacity may appeal the denial of a motion to dismiss premised on a claim that it is an arm of the state, and hence not a "person" within the meaning of section 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). Such a claim is immediately appealable because it can be characterized as an assertion of Eleventh Amendment immunity. *See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684 (1993) ("*PRASA*"). Thus, at this point, the only category of defendants who do not have a recognized right to an interlocutory appeal from the rejection of a legal defense in a section 1983 action is municipal defendants sued under *Monell*.[12]

There are strong reasons, however, for treating a municipality's *Monell* defense in the same way that the Court has treated the defenses available to individual and state defendants. To begin with, the Court has already emphasized that the "identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737 (1989) (emphasis in original). In so doing, the Court has impliedly recognized a municipality's interest in hav-

[12] Municipalities are, of course, not shielded by the Eleventh Amendment immunity that protects the states. Nor do they have qualified "good faith" immunity. *See Owen v. City of Independence*, 445 U.S. 622 (1980).

ing this legal issue resolved not only correctly but in advance of the trial on the merits.

Moreover, much of the reasoning offered to justify immediate appeals in *Mitchell* and *PRASA* is equally applicable when a municipality is sued for damages. Thus, in *Mitchell*, the Court made the practical judgment that the underlying purposes of qualified immunity—avoiding "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service," 472 U.S. at 526—would be better served if individual defendants had the right to appellate consideration of their immunity claims prior to trial. In *PRASA*, the Court raised similar practical concerns, 113 S. Ct. at 688 ("the value to the States of their Eleventh Amendment immunity . . . is for the most part lost as litigation proceeds past motion practice"), and went on to give greater emphasis to "the importance of ensuring that the States' dignitary interests [are] fully vindicated," *id.* at 689.

Here, we are dealing with a determination by Congress, based on its understanding of underlying constitutional constraints, that municipalities should only be sued under section 1983 for illegal policies that *they* have deliberately adopted. *Monell*, *supra*. In a case where a municipality has a valid defense under that standard, but the district court has erroneously rejected that defense, deferral of an appeal until after trial will often have serious practical consequences and, more fundamentally, will always mean that the will of Congress is not fully vindicated. After all, at that point, section 1983 will have become a vehicle for forcing municipal governments to go through the rigors of trial even in cases where Congress determined that it would be improper for them to have to answer to the federal courts.

The only apparent argument for distinguishing between the good-faith and Eleventh Amendment defenses, on the one hand, and a *Monell* defense, on the other, is that the

former have been characterized as "immunities." But, for the reasons already suggested, this is ultimately an arbitrary distinction. The *Monell* "policy or custom" limitation on municipal liability, while not denominated a form of "immunity," was created by Congress in 1871 expressly because Congress believed that it would have been unconstitutional to overstep that bound and impose *respondeat superior* liability on municipalities. In this sense, it is very comparable to the immunity of "arms of the state" and the qualified immunity enjoyed by individual defendants, which are equally based on decisions by *Congress*[13] about the appropriate limits of section 1983 liability for particular categories of defendants. *Cf. Digital Equipment Corp.*, 114 S. Ct. at 2001-02 (drawing a distinction, for purposes of the collateral-order rule, between privately created rights and immunities that have a constitutional or statutory basis).[14] And, as with these other limitations on the scope of section 1983, much of the benefit of Congress's limitation is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 527. For these reasons, the Court should hold that the third prong of the *Cohen* test is satisfied in this instance.

The first two prongs of the test are also satisfied here. First, when the County Commission filed its appeal, the

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[13] Although the Eleventh Amendment is, of course, a constitutional provision, Congress has the power to limit its application. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14 (1989) (plurality opinion of Brennan, J.); *id.* at 57 (White, J., concurring in the judgment). Thus, the immunity of state entities from liability under section 1983 is ultimately a choice made by Congress.

[14] The essentially arbitrary nature of the label "immunity" is further illustrated by *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981), where the Court held that Congress, in enacting section 1983, had created an "immunity" for municipalities from punitive damages. There is no apparent reason why this aspect of the scope of municipal liability under section 1983 should constitute an immunity, while the "policy and custom" rule does not.

district court had "conclusively" held that respondent would be forced to go to trial before it could hope to prevail on its *Monell* defense. In its order on reconsideration, the court had indicated that it was not going to resolve the question whether Sheriff Morgan is a county policymaker at the summary judgment stage but would "make a ruling as a matter of law on that issue before the case goes to the jury." Pet. App. 72a. Assuming that *Monell* does create a right to avoid trial in those situations where, as a matter of law, the municipal "policy or custom" requirement is not met, the district court's action meant that respondent's assertion of this right had been "conclusively" rejected.

Finally, the issue that respondent sought to raise was certainly an "important issue completely separate from the merits of the action." To begin with, it is apparent that respondent's claim was "important." Involving as it did the vindication of Congress's will with respect to the situations in which federal courts may take action against municipal governing bodies, it was inherently important. Moreover, because the particular question raised—whether an autonomous state official could make policy for a county commission—was "serious and unsettled," *Cohen*, 337 U.S. at 547, the importance of the issue was enhanced in this instance.

Respondent's claim was also entirely separate from the merits. Petitioners have never alleged that the County Commission itself has *done* anything to them. Their theory of the County Commission's liability is based entirely on certain general propositions concerning the nature of the legal relationship between counties and sheriffs in Alabama. That theory would be equally applicable in all other cases involving alleged misconduct by Alabama sheriffs, regardless of the particular "merits" of each case.

For these reasons, a municipality should be authorized to bring an interlocutory appeal from the denial of a

motion arguing that a particular official lacks the legal authority to set municipal policy.[15]

CONCLUSION

The Court should conclude that the Eleventh Circuit had valid jurisdiction to reach the County Commission's claim, and proceed to address the merits of the issues previously briefed in this Court.

Respectfully submitted,

PAUL M. SMITH *
BRUCE J. ENNIS
DONALD B. VERRILLI, JR.
THOMAS J. PERRELLI
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

JAMES W. WEBB
KENDRICK E. WEBB
BART HARMON
WEBB & ELEY, P.C.
166 Commerce Street
Suite 300
Post Office Box 238
Montgomery, Alabama 36101
(205) 262-1850
Counsel for Respondent

December 15, 1994

* Counsel of Record

[15] At a minimum, even if the Court decides that a rejection of such a *Monell* defense is not an appealable collateral order, the availability of pretrial appeals to all categories of section 1983 defendants *other* than municipalities should play a role in the Court's analysis of the pendent appellate jurisdiction issue. It would be particularly anomalous to hold that municipalities not only lack a right to appeal prior to trial but must, in every case, wait behind while individual and state co-defendants pursue such appeals.

No. 93-1636

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

TOM SWINT, TONY SPRADLEY, DRUCILLA JAMES and JEROME LEWIS,
Petitioners,
v.
CHAMBERS COUNTY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT CHAMBERS COUNTY COMMISSION

PAUL M. SMITH *
BRUCE J. ENNIS
DONALD B. VERRILLI, JR.
THOMAS J. PERRELLI
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

JAMES W. WEBB
KENDRICK E. WEBB
BART HARMON
WEBB & ELEY, P.C.
166 Commerce Street
Suite 300
Post Office Box 238
Montgomery, Alabama 36101
(205) 262-1850
Counsel for Respondent

* Counsel of Record

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23 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

MISCELLANEOUS

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SUPPLEMENTAL BRIEF FOR RESPONDENT CHAMBERS COUNTY COMMISSION

The United States Court of Appeals for the Eleventh Circuit did not exceed its authority when it chose to exercise "pendent appellate jurisdiction" to review the district court's denial of the County Commission's motion for summary judgment. Legal and practical considerations compel the conclusion that courts of appeals should have discretion to review nonappealable orders that are pendent to appealable "collateral orders," and this was certainly a circumstance where that discretion was properly exercised. The court resolved a purely legal issue that was ripe for review, was closely related to the other issues before the court, and had the potential to resolve *all* of the remaining claims against the County Commission.

Alternatively, the district court's order denying the County Commission's motion for summary judgment was itself an appealable "collateral order." In that motion, respondent argued that this case did not satisfy the prerequisites for municipal liability under section 1983 identified in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), because Sheriff Morgan lacked the legal authority to set actionable "policies" for the County Commission. Consistent with this Court's treatment of the appealability of orders rejecting other analogous defenses in section 1983 actions, respondent submits that the Court should also authorize interlocutory appeals from orders rejecting such legal arguments when presented by municipal defendants in section 1983 litigation.

I. COURTS OF APPEALS SHOULD HAVE THE POWER TO REACH "PENDENT" ISSUES IN COLLATERAL-ORDER APPEALS.

The Eleventh Circuit was faced with simultaneous pretrial appeals by three individual defendants and by two municipal defendants, respondent Chambers County Commission and the City of Wadley. The individual defendants, who included Sheriff Morgan, had the right to appeal from the denial of their motions claiming qualified immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985) (concluding that denial of a qualified-immunity motion is an appealable collateral order). The municipalities were appealing from the denial of motions for summary judgment predicated on the legal argument that the individual defendants were not municipal "policymakers" under *Monell*. The Eleventh Circuit decided that this issue was not independently appealable, Pet. App. 29a-30a, but chose to exercise "pendent appellate jurisdiction" over the County Commission's appeal, *id. at* 30a-31a.[1]

[1] The court of appeals refused to entertain the City's appeal, concluding that the state of the record precluded a final determination whether the Chief of Police in Wadley has, in practice, final policymaking authority. Pet. App. 37a.

The decision to entertain the County Commission's appeal finds ample support in the case law in the Eleventh Circuit[2] and other circuits.[3] This Court, however, has not signalled a consistent approach to the permissible scope of appellate review in the collateral-order context. *Compare Abney v. United States*, 431 U.S. 651, 662-63 (1977) (collateral-order appeal of double jeopardy claim does not provide basis for pretrial review of sufficiency of indictment), *with Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974) (collateral-order appeal of order allocating costs of class-action notice permits consideration of decision to allow notice by publication). *See* Note, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 Yale L.J. 511, 518, 519

[2] *See Menuel v. City of Atlanta*, 25 F.3d 990, 995 n.7 (11th Cir. 1994); *Kelly v. Curtis*, 21 F.3d 1544, 1545 (11th Cir. 1994); *Schmelz v. Monroe County*, 954 F.2d 1540, 1543-44 (11th Cir. 1992); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1509 (11th Cir. 1990).

[3] Although some circuits limit pendent appellate jurisdiction to review of issues that are "inextricably intertwined" with an appealable issue, *see, e.g., Williams v. Commonwealth*, 24 F.3d 1526, 1542-43 (6th Cir.), *cert. denied*, 115 S. Ct. 358 (1994); *Brown v. Grabowski*, 922 F.2d 1097, 1106 n.3 (3d Cir. 1990), *cert. denied*, 501 U.S. 1218 (1991), several others have joined the Eleventh Circuit in holding that they have discretion to reach pendent issues where there is substantial overlap with appealable issues and where a broader ruling will promote the resolution of the case, *see, e.g., San Filippo v. U.S. Trust Co. of New York*, 737 F.2d 246, 255 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985) (reaching the merits in a qualified-immunity appeal, because of the "waste of judicial resources" if suit were to go forward); *Akers v. Caperton*, 998 F.2d 220, 224 (4th Cir., 1993) (resolving constitutional claim because it was "substantially related to the [appealable] immunities issue and its resolution will advance this litigation"); *Robinson v. Volkswagenwerk AG*, 940 F.2d 1369, 1374 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1160 (1992) (setting forth factors guiding exercise of discretion).

(1990) (in *Eisen*, "the Court appeared to sanction the extension of collateral-order jurisdiction to pendent rulings"; in *Abney*, "however, the Court took a markedly different approach"). *See also* 16 C. Wright, A. Miller, E. Cooper, and E. Gressman, *Federal Practice and Procedure* § 3937, at 373 (*Abney* "should not be read to preclude consideration of noncollateral rulings when special circumstances suggest that this course would be desirable, and that there has been no attempt to abuse the collateral order appeal opportunity").[4] As explained more fully below, the Eleventh Circuit's exercise of pendent appellate jurisdiction in this case was fully consistent with this Court's treatment of the scope of appellate jurisdiction in analogous contexts, and also made a great deal of sense.

A. The Power to Exercise Pendent Appellate Jurisdiction Is Well Recognized in a Broad Range of Contexts.

This Court has previously noted that the statutes governing appellate jurisdiction, such as 28 U.S.C. § 1291, are to be construed in light of their "object of efficient administration of justice in the federal courts." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 1996 (1994); *see* 9 J. Moore, *Moore's Federal Practice* § 110 (noting that section 1291 "has been liberally construed"); *cf.* Fed. R. Civ. P. 1 (civil rules "shall be construed and administered to secure the just, speedy,

[4] As petitioners point out, Supp. Br. at 6-7, *Chicago R.I. & P.R. Co. v. Stude*, 346 U.S. 574 (1954), is another relevant precedent. There, one party had appealed the dismissal of its complaint. In a consolidated case that had been removed from state court, the opposing party simultaneously appealed the denial of its motion to remand. Although recognizing that denial of a motion to remand is not independently appealable, *id.* at 578, the Court held that the court of appeals properly reached that issue on the basis of the pending appeal filed in the other case by the opposing party, which apparently was based (like collateral-order appeals) on 28 U.S.C. § 1291, *id.*

and inexpensive determination of every action"). The principal policy concern underlying the "finality" requirement of section 1291 is Congress's desire to avoid "piecemeal litigation." *E.g., Catlin v. United States*, 324 U.S. 229, 233-234 (1945). That concern justifies careful limitations on the categories of orders that may form the basis of interlocutory appeals. *See Digital Equipment Corp., supra.* Where such an appeal has been properly filed, however, the *same* concern argues in *favor* of granting appellate tribunals the power to resolve related issues that might otherwise require a later appeal. Thus, in a broad range of contexts, this Court has consistently held that the courts of appeals have discretion to consider "pendent" legal issues, even if those issues, by themselves, could not have formed an independent basis for appellate jurisdiction.

For example, it is well established that the courts of appeals, when reviewing preliminary injunctions under 28 U.S.C. § 1292(a)(1), are not confined to considering the propriety of the injunctions themselves. To the contrary, "[j]urisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development." 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *supra*, § 3921, at 17. As Judge Friendly put the matter, "when, as here, the district court has granted a temporary injunction so that the court of appeals has unquestioned jurisdiction of the cause, it would be absurd to require the court to close its eyes to another interlocutory order which, though not itself appealable, might infect the entire proceeding with error and thus require reversal after the large expenditure of judicial and professional time." *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1201 (2d Cir. 1970) (reviewing the district court's refusal to stay proceedings).

Thus, this Court has held that it can be appropriate, in an appeal from the grant or refusal of preliminary injunctive relief, for the court of appeals to proceed to decide the case on the merits. *See Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 757 (1986). Although the Court in *Thornburgh* recognized that courts of appeals would ordinarily review only the injunction itself in such cases, the Court made clear that this was "a rule of orderly judicial administration, not a limit on judicial power." *Id.* Where "a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance," the court of appeals may address any issue under its plenary scope of review. *Id. See also Deckert v. Independence Shares Corp.,* 311 U.S. 282, 287 (1940) (approving review of order denying motion to dismiss in connection with appeal from separate order granting preliminary injunction).

The Court has adopted a similarly broad interpretation of the jurisdictional statute at issue here—section 1291—in its usual application involving appeals after final judgment has been entered. In that setting, the Court has authorized appellate consideration of almost any interlocutory order previously entered by the district court, even those that were entirely separate from the merits of the "final decision" that formed the basis of the appeal. *See* 15A C. Wright, A. Miller & E. Cooper, *supra,* § 3905.1, at 250 & n. 3 (citing cases).

Another example is the scope of review available to a court of appeals that has jurisdiction to consider one particular action of a district court on a petition for a writ of mandamus. In such a case, this Court has authorized a court of appeals, in order to avoid "piecemeal litigation," to go on and consider related issues that could not themselves have been brought to the court through mandamus. *Schlagenhauf v. Holder,* 379 U.S. 104, 111 (1964); *see Southern Pacific Transp. Co. v. San Antonio,*

748 F.2d 266, 270 (5th Cir. 1984) (where case came to court on petition for a writ of mandamus challenging a stay of execution of judgment, court of appeals had power to address related issues that "may not independently be grounds for mandamus"). Wright and Miller offer the following explanation of the practical considerations that underlie the *Schlagenhauf* rule:

> [T]he determination that the scope of mandamus review might properly be extended to related questions that would not independently support such review seems entirely appropriate. All of the damage that may be done by mandamus procedure has been realized once the question of power is brought before the court of appeals. If closely related matters can be determined without additional delay, burden on the parties or the courts, or expansion beyond the powers a court of appeals might exercise on other methods of review, they are better determined on the petition.

16 C. Wright, A. Miller, E. Cooper & E. Gressman, *supra,* § 3934, at 232.

Finally, the Court has applied the same practical construction when determining the scope of its own powers of review in cases brought here on writs of certiorari. Although the usual rule is that the Court will not review issues that are not raised in the petition for certiorari, the Court has reserved the power to address any other issue it discerns in the record of the case. *Wood v. Georgia,* 450 U.S. 261, 264 n.5 (1981); *Vance v. Terrazas,* 444 U.S. 252, 258 n.5 (1980) ("consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented [below] is not beyond our power, and in appropriate circumstances we have addressed them"); *see also* S. Ct. Rule 24.1(a) ("At its option, . . . the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.").

Thus, if the Court were to conclude that review, in collateral-order appeals, is categorically limited to the merits of the specific order on appeal, and that courts of appeals lack discretion to consider related issues even where doing so would plainly expedite the orderly resolution of the case, such a rule would stand out as exceptional. For the reasons stated in the next section, we do not believe that such an exceptional rule is justified.

B. The Courts of Appeals Should Have Equivalent Discretion in Collateral-Order Appeals.

In deciding whether Congress intended to allow courts of appeals to exercise pendent appellate jurisdiction in collateral-order cases, it is of course appropriate to begin with the statute itself. Section 1291, however, provides no real guidance, since it does not address the *scope* of review in appeals from "final decisions." The fairest conclusion is that Congress left it up to the courts to determine the appropriate scope of review, where an appeal has been properly filed.[5] The statutory language provides no basis for drawing a distinction, in terms of the scope of review, between collateral-order appeals, on the one hand, and other appeals under section 1291 or injunctive appeals under section 1292(a)(1), on the other.[6] Nor

[5] As a general matter, it should not be assumed that Congress intended a strict construction of the statutes establishing the jurisdiction of the courts of appeals, in view of the fact that it simultaneously granted this Court the power, by rule, to authorize an appeal of any "interlocutory decision . . . that is not otherwise provided for." 28 U.S.C. § 1292(e). Congress has also expressly conferred power on this Court to define the word "final" in section 1291 by rule. *See* 28 U.S.C. § 2072.

[6] Section 1291 grants jurisdiction over "appeals from all final decisions of the district courts," without addressing whether review is limited to the merits of such "final decisions." Section 1292(a)(1) grants jurisdiction over appeals from "interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions," without addressing whether review is limited to such orders.

is there any apparent basis in the statute's language for rejecting the concept of "pendent jurisdiction" in the appellate context, while accepting the same concept in the interpretation of the statutes granting jurisdiction to the federal *district* courts. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).[7]

Because the statute does not preclude pendent appellate jurisdiction in collateral-order appeals, this Court can and should opt in favor of allowing courts of appeals to exercise that power. The "same practical considerations for avoiding piecemeal appeals that underlie the final order doctrine instruct that when an appeal is otherwise warranted on a single issue, we may review all issues that the parties raise and which are reasonably related when that review will advance the litigation or avoid further appeals." *O'Bar v. Pinion*, 953 F.2d 74, 80 (4th Cir. 1991). Just as in the injunctive appeal context, if there is an important but nonappealable issue that is ready for review when a collateral order is appealed, a decision to review that issue can sometimes produce enormous savings in time and judicial resources. *See Schmelz v. Monroe County*, 954 F.2d 1540, 1542-43 (11th Cir. 1992) (citing "concerns for judicial economy"); *San Filippo v. U.S. Trust Co.*, 737 F.2d 246, 255 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985). There would be no justification for requiring the courts of appeals, in this one category of appeals, to stay their hand even when it is apparent that they are remanding a case for lengthy additional proceedings that will be a complete waste of time because of a previous error committed by the district court.

[7] As noted, the Eleventh Circuit in this case treated the appeal of one party, the Chambers County Commission, as "pendent" to the authorized interlocutory appeal of another party, Sheriff Morgan. In this regard, it is noteworthy that Congress, when it codified the rules of pendent jurisdiction for federal district courts, specifically endorsed "pendent party jurisdiction." *See* 28 U.S.C. § 1367(a) ("Such supplemental jurisdiction shall include claims that involve joinder or intervention of additional parties.").

Certainly such a restrictive approach cannot be defended on the theory that allowing pendent appellate jurisdiction in the collateral-order context will do more systemic harm than good. None of the arguments against allowing courts of appeals to have this power retains any force if courts will exercise appropriate *discretion* in deciding whether to exercise pendent jurisdiction in each case.

First, courts of appeals must be sensitive to the same policy concern that has led this Court to limit interlocutory appeals—the need to minimize "piecemeal appeals." *See, e.g., Digital Equipment Corp.*, 114 S. Ct. at 1998. But this concern is not very compelling here, where the issue is whether to broaden the scope of an interlocutory appeal that has *already* been filed. In most instances, if a collateral-order appeal is already being pursued in a case, addressing "pendent" issues will not increase the disruptive effects of the appeal. In any event, where a pendent appeal is likely to add to the disruption caused by a collateral-order appeal, the court of appeals may decide, in its discretion, not to hear or decide the pendent issue.

A more specific concern in this context is the one expressed in *Abney, supra*—that a rule allowing pendent appeals "would encourage criminal defendants to seek review of, or assert, frivolous [collateral-order] claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to" trial. 431 U.S. at 663. But, here again, the discretionary nature of pendent appellate jurisdiction alleviates this concern. Courts of appeals should refuse to address any "pendent" issues except in those cases where the appellant has mounted at least a substantial legal challenge to the appealable collateral order that is supplying the court's appellate jurisdiction. Indeed, that is precisely the rule applied when district courts are deciding whether to exercise pendent jurisdiction of state-law claims. *See United Mine Workers*, 383 U.S. at 726-27; *see also* 28

U.S.C. § 1367(c)(2) (allowing district courts to dismiss pendent state claims if "the [state] claim substantially predominates over the claim or claims over which the district court has original jurisdiction").

Finally, any concern that courts of appeals will reach issues prematurely, in the absence of an adequate record, can also be handled through the exercise of appropriate discretion. Just as in the injunctive-appeal context, *see Thornburgh*, 476 U.S. at 757, the courts of appeals should only address pendent issues in collateral-order appeals when there is no potential dispute about the relevant facts. In the absence of such a dispute, they are in as good a position to decide the issue in the current appeal as they would be in a later appeal.

As these arguments suggest, the appropriate use of pendent appellate jurisdiction in the collateral-order context is likely to be relatively rare. The courts of appeals can and should be reticent about deciding issues beyond the merits of the appealable collateral order itself. And experience, in those circuits that have been most receptive to the concept, teaches that the power has not been abused. But the courts of appeals also should not be required to remand a case for trial with the knowledge that the future course of the proceedings will be made much more burdensome, or even entirely pointless, because of an erroneous legal ruling already entered by the district court.

II. AN EXERCISE OF PENDENT APPELLATE JURISDICTION WAS FULLY APPROPRIATE IN THIS CASE.

The case at bar presents an example of the appropriate exercise of pendent appellate jurisdiction. Indeed, in the circumstances of this case, there can be little doubt that the Eleventh Circuit correctly weighed the competing costs and benefits of broadening the scope of its review to include not only the qualified individual immunity of Sheriff Morgan but also municipal liability under *Monell*.

First, the Eleventh Circuit had every reason to believe that addressing the County Commission's potential liability at this stage would be beneficial. Whether the County Commission could be held liable for Sheriff Morgan's conduct was a pure question of law that had already been presented to the district court. *Both* parties supported the court's decision to address this question once the case had been brought to the appellate level. The question was substantially related to the qualified-immunity issue already before the court.[8] Most importantly, in the circumstances of this case, if the County Commission was correct in its arguments, "reviewing the district court's order would put an end to the entire case against the County." Pet. App. 31a. Thus, there was a potential to simplify the remand proceedings substantially, while shielding a governmental body from the rigors of a pointless but complex trial.

There was also no reason to believe that deciding this additional issue would be harmful in any way. There was no danger of disrupting pending district court proceedings, because the trial of the case against the Chambers County Commission clearly was not going to proceed prior to the disposition of the individual defendants' appeal on their qualified immunity claims.[9] Nor was there any basis for

[8] A first step, in any analysis of qualified immunity in the Eleventh Circuit, is a determination whether the defendant " 'was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.' " *Rich v. Dollar*, 841 F.2d 1558, 1563 (11th Cir. 1988) (quoting *Zeigler v. Jackson*, 716 F.2d 847, 849 (11th Cir. 1983)). *See* Pet. App. 10a (noting this element of the test). That determination, of course, is closely related to the question whether the individual defendant has sufficient authority to make "policy" for a given municipality.

[9] It would have made no sense for the district court to convene a trial against the County Commission, without the individual defendants, since the constitutionality of the Sheriff's conduct would have had to be litigated in such a trial. If claims against individuals and municipalities are not going to be tried together, it makes far more sense to try the former first, proceeding to a trial against the municipality only if the jury determines that the individuals acted unconstitutionally. *See, e.g., City of Los Angeles v. Heller*, 475 U.S. 796 (1986).

concern that the qualified-immunity appeals were pretexts for bringing the County Commission's claim to the appellate level. To the contrary, the individual defendants partially *prevailed* in their arguments concerning qualified immunity.[10]

Finally, the Eleventh Circuit was very attentive to the need for an adequate record on which to resolve the pendent issue. It chose to reach the question of the authority of an Alabama sheriff to set policy for a county, precisely because there was an adequate record for resolving that question. But it simultaneously refused to entertain the City of Wadley's appeal, because there was an inadequate record for deciding whether, in "custom and practice," the city's police chief exercised policymaking authority. Pet. App. 37a.

In these circumstances, the Eleventh Circuit's careful exercise of discretion to hear the Chambers County Commission's appeal was perfectly appropriate.

III. IN THE ALTERNATIVE, THE COURT OF APPEALS HAD JURISDICTION UNDER THE COLLATERAL-ORDER DOCTRINE TO DETERMINE WHETHER THE COUNTY COMMISSION COULD BE HELD LIABLE FOR THE ACTIONS OF A STATE OFFICIAL.

This Court has not considered whether denial of a municipality's motion to dismiss a section 1983 claim—for failure to satisfy the *Monell* "policy or custom" standard—is an appealable order under the collateral-order

[10] The Eleventh Circuit ruled that the district court had erred in refusing to find that the individual defendants were immune from claims under the Due Process Clause. Pet. App. 25a-27a. On rehearing, the court held that the district court should also have entered summary judgment for Sheriff Morgan on the equal protection claim. *Id.* at 43a.

rule. The logic of this Court's previous cases, however, suggests that the Court should treat such a denial as an appealable order, at least where, as here, the motion is based entirely on a *legal* argument that a given official lacks the authority to set municipal policy through his actions.

As this Court has noted, the collateral-order doctrine is not an exception to the finality requirement of section 1291, but rather is a "practical construction" of it. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *Digital Equipment Corp.*, 114 S. Ct. at 1995. To fall within the collateral-order doctrine, a district court order must "conclusively determine the disputed question," "resolve an important issue completely separate from the merits of the action," and "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (summarizing *Cohen*). These criteria are all met where, as here, (1) plaintiffs have premised section 1983 claims against a municipality entirely on the proposition that a given official sets municipal policy through his or her actions, and (2) the district court has rejected the municipality's pretrial motion arguing that, as a matter of law, that official lacks the authority to set policy for the municipality.[11]

The key question here involves the application of the third prong of the *Cohen* test—*i.e.*, whether municipalities can claim a substantial interest in avoiding unnecessary trials in cases where *Monell* is not satisfied, and thus have a claim that would be "effectively unreviewable" in the

[11] The situation may be quite different in the much more numerous category of cases where plaintiffs allege that a municipality has adopted an illegal "policy" through a long course of customary conduct, or by ratification of a given employee's actions. In such cases, there are likely to be subsidiary factual issues that need to be resolved and render an interlocutory appeal undesirable. Here, by contrast, the issue appealed was a pure question of law concerning a given official's authority to set municipal policy.

absence of an interlocutory appeal in circumstances like those presented here. In addressing this question, it is noteworthy that the Court has already authorized collateral-order appeals with respect to the other two major legal defenses available under section 1983. Individual defendants sued in their individual capacity may, as in the present case, appeal the denial of a motion to dismiss premised on a claim of good-faith immunity. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985). In addition, any individual or governmental body sued in its official capacity may appeal the denial of a motion to dismiss premised on a claim that it is an arm of the state, and hence not a "person" within the meaning of section 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). Such a claim is immediately appealable because it can be characterized as an assertion of Eleventh Amendment immunity. *See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684 (1993) ("*PRASA*"). Thus, at this point, the only category of defendants who do not have a recognized right to an interlocutory appeal from the rejection of a legal defense in a section 1983 action is municipal defendants sued under *Monell*.[12]

There are strong reasons, however, for treating a municipality's *Monell* defense in the same way that the Court has treated the defenses available to individual and state defendants. To begin with, the Court has already emphasized that the "identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737 (1989) (emphasis in original). In so doing, the Court has impliedly recognized a municipality's interest in hav-

[12] Municipalities are, of course, not shielded by the Eleventh Amendment immunity that protects the states. Nor do they have qualified "good faith" immunity. *See Owen v. City of Independence*, 445 U.S. 622 (1980).

ing this legal issue resolved not only correctly but in advance of the trial on the merits.

Moreover, much of the reasoning offered to justify immediate appeals in *Mitchell* and *PRASA* is equally applicable when a municipality is sued for damages. Thus, in *Mitchell*, the Court made the practical judgment that the underlying purposes of qualified immunity—avoiding "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service," 472 U.S. at 526—would be better served if individual defendants had the right to appellate consideration of their immunity claims prior to trial. In *PRASA*, the Court raised similar practical concerns, 113 S. Ct. at 688 ("the value to the States of their Eleventh Amendment immunity . . . is for the most part lost as litigation proceeds past motion practice"), and went on to give greater emphasis to "the importance of ensuring that the States' dignitary interests [are] fully vindicated," *id.* at 689.

Here, we are dealing with a determination by Congress, based on its understanding of underlying constitutional constraints, that municipalities should only be sued under section 1983 for illegal policies that *they* have deliberately adopted. *Monell, supra.* In a case where a municipality has a valid defense under that standard, but the district court has erroneously rejected that defense, deferral of an appeal until after trial will often have serious practical consequences and, more fundamentally, will always mean that the will of Congress is not fully vindicated. After all, at that point, section 1983 will have become a vehicle for forcing municipal governments to go through the rigors of trial even in cases where Congress determined that it would be improper for them to have to answer to the federal courts.

The only apparent argument for distinguishing between the good-faith and Eleventh Amendment defenses, on the one hand, and a *Monell* defense, on the other, is that the

former have been characterized as "immunities." But, for the reasons already suggested, this is ultimately an arbitrary distinction. The *Monell* "policy or custom" limitation on municipal liability, while not denominated a form of "immunity," was created by Congress in 1871 expressly because Congress believed that it would have been unconstitutional to overstep that bound and impose *respondeat superior* liability on municipalities. In this sense, it is very comparable to the immunity of "arms of the state" and the qualified immunity enjoyed by individual defendants, which are equally based on decisions by *Congress*[13] about the appropriate limits of section 1983 liability for particular categories of defendants. *Cf. Digital Equipment Corp.*, 114 S. Ct. at 2001-02 (drawing a distinction, for purposes of the collateral-order rule, between privately created rights and immunities that have a constitutional or statutory basis).[14] And, as with these other limitations on the scope of section 1983, much of the benefit of Congress's limitation is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 527. For these reasons, the Court should hold that the third prong of the *Cohen* test is satisfied in this instance.

The first two prongs of the test are also satisfied here. First, when the County Commission filed its appeal, the

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[13] Although the Eleventh Amendment is, of course, a constitutional provision, Congress has the power to limit its application. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14 (1989) (plurality opinion of Brennan, J.); *id.* at 57 (White, J., concurring in the judgment). Thus, the immunity of state entities from liability under section 1983 is ultimately a choice made by Congress.

[14] The essentially arbitrary nature of the label "immunity" is further illustrated by *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981), where the Court held that Congress, in enacting section 1983, had created an "immunity" for municipalities from punitive damages. There is no apparent reason why this aspect of the scope of municipal liability under section 1983 should constitute an immunity, while the "policy and custom" rule does not.

district court had "conclusively" held that respondent would be forced to go to trial before it could hope to prevail on its *Monell* defense. In its order on reconsideration, the court had indicated that it was not going to resolve the question whether Sheriff Morgan is a county policymaker at the summary judgment stage but would "make a ruling as a matter of law on that issue before the case goes to the jury." Pet. App. 72a. Assuming that *Monell* does create a right to avoid trial in those situations where, as a matter of law, the municipal "policy or custom" requirement is not met, the district court's action meant that respondent's assertion of this right had been "conclusively" rejected.

Finally, the issue that respondent sought to raise was certainly an "important issue completely separate from the merits of the action." To begin with, it is apparent that respondent's claim was "important." Involving as it did the vindication of Congress's will with respect to the situations in which federal courts may take action against municipal governing bodies, it was inherently important. Moreover, because the particular question raised—whether an autonomous state official could make policy for a county commission—was "serious and unsettled," *Cohen*, 337 U.S. at 547, the importance of the issue was enhanced in this instance.

Respondent's claim was also entirely separate from the merits. Petitioners have never alleged that the County Commission itself has *done* anything to them. Their theory of the County Commission's liability is based entirely on certain general propositions concerning the nature of the legal relationship between counties and sheriffs in Alabama. That theory would be equally applicable in all other cases involving alleged misconduct by Alabama sheriffs, regardless of the particular "merits" of each case.

For these reasons, a municipality should be authorized to bring an interlocutory appeal from the denial of a

motion arguing that a particular official lacks the legal authority to set municipal policy.[15]

CONCLUSION

The Court should conclude that the Eleventh Circuit had valid jurisdiction to reach the County Commission's claim, and proceed to address the merits of the issues previously briefed in this Court.

Respectfully submitted,

PAUL M. SMITH *
BRUCE J. ENNIS
DONALD B. VERRILLI, JR.
THOMAS J. PERRELLI
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

JAMES W. WEBB
KENDRICK E. WEBB
BART HARMON
WEBB & ELEY, P.C.
166 Commerce Street
Suite 300
Post Office Box 238
Montgomery, Alabama 36101
(205) 262-1850

Counsel for Respondent

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* Counsel of Record

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[15] At a minimum, even if the Court decides that a rejection of such a *Monell* defense is not an appealable collateral order, the availability of pretrial appeals to all categories of section 1983 defendants *other* than municipalities should play a role in the Court's analysis of the pendent appellate jurisdiction issue. It would be particularly anomalous to hold that municipalities not only lack a right to appeal prior to trial but must, in every case, wait behind while individual and state co-defendants pursue such appeals.